82-1363

No. _____

In The
Supreme Court Of The United States

MARCH TERM, 1983

HERBERT R. SILVER, d/b/a
ALLIED BOND AND COLLECTION AGENCY
Petitioner

v.

BRIAN J. WOOLF, IN HIS CAPACITY AS ACTING
BANKING COMMISSIONER OF THE
STATE OF CONNECTICUT
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

Does §42-127a(a)(3) of the Connecticut General Statutes, requiring a license of an out-of-state collection agency as a condition of collecting accounts from Connecticut consumer debtors on behalf of foreign creditors exclusively in interstate commerce, violate the Commerce Clause of the United States Constitution on its face or as applied?

Was summary judgment properly granted against the Petitioner where the claim was made that the cumulative effect of multiple and inconsistent state licensing laws on a collection agency seeking to collect debts in each of the fifty states from a single location would constitute an impermissible burden on interstate commerce?

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The Opinion of the Court of Appeals, attached hereto in Petitioner's Appendix, ("P. App") at Page 1A, is reported at 694 F. 2d 8 (2nd Cir. 1982). The Opinion of the District Court, attached hereto at P. App. 15A, is reported at 538 F. Supp. 881 (D. Conn. 1982).

JURISDICTION

The Decision of the Court of Appeals was entered on November 15, 1982. The Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Commerce Clause of the U.S. Constitution, Article I, Section 8, Clause 3, provides:

The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

The Statute involved, C.G.S. §42-127a(a)(3) provides:

> "(a) No person shall act within the State as a consumer collection agency, unless such person holds a license then in force from the commissioner authorizing him so to act. A consumer collection agency is acting within this State if it . . . (3) has its place of business located outside this State and regularly collects from consumer debtors who reside within this State for creditors whose place of business is located outside this State."

Other relevant portions of Chapter 739 of the Connecticut General Statutes, dealing with the licensing and regulation of consumer collection agencies, are set forth at P. App. 37A to 48A. Also set forth at P. App. 49A is the pre-emption provision of the Fair Debt Collection Practices Act, 15 U.S.C. 1692n.

STATEMENT OF THE CASE

A. STATEMENT OF THE FACTS

The Petitioner, Herbert R. Silver, d/b/a Allied Bond and Collection Agency ("Allied"), does business as a collection agency throughout the 50 states and in several United States territories and foreign countries from its sole office in Trevose, Pennsylvania. It has contacted debtors in Connecticut on behalf of creditors from states other than Connecticut since prior to 1978. Although Allied is typically unaware of the purpose for which any debtor it contacts on behalf of a client has incurred indebtedness, it does not dispute that many of such debtors are "consumer debtors" as that term is defined in §42-127(d) of the Connecticut General Statutes. Accordingly, Allied is a "consumer collection agency" as that term is defined in C.G.S. §42-127(b).

Without exception, Allied's contacts with debtors in the State of Connecticut are carried out through interstate mail and interstate telephone communication from its office in Pennsylvania. Neither Mr. Silver nor any employee of Allied resides or has resided in the State of Connecticut, nor has Allied ever maintained an office in Connecticut. Allied has never maintained a mailing address, post office box, telephone, telephone listing or bank account in the State of Connecticut, nor has it ever sent an employee, agent or other representative into the State for any purpose. It does not utilize any independent contractor within the State for any purpose. Allied has never solicited companies located within the State of Connecticut as clients, and has no clients with principal offices in the State. Allied owns no real or personal property of any kind in Connecticut, and none of the money it collects on behalf of clients is forwarded to the State.

As of December 14, 1981, Allied had some 3,422 open or active files concerning debtors located in the State of Connecticut. These accounts represented at that date less than 2% of the total accounts referred to Allied for collection by its clients.

Prior to the second quarter of 1981, Allied represented the Atlantic Richfield Oil Company (ARCO) and the Mobil Oil Corporation with respect to certain past-due accounts of those companies regarding customers residing in Connecticut. Employees of the Respondent State Banking Commissioner (the "Commissioner") contacted Mobil in January of 1981 and ARCO in May of 1981 and advised each that:

> "Section 42-131a(b) of Title 42, Chapter 739 of the Connecticut General Statutes prohibits a creditor ... from engaging the services of a collection agency that is not licensed as such by the Banking Commissioner."

Shortly thereafter, the Commissioner also contacted the Shell Oil Company to the same effect. As a result of those communications, all three companies have terminated Allied's representation of them with respect to previously forwarded accounts of debtors located in the State of Connecticut, and each has ceased the forwarding of new accounts pending a resolution of this matter. All have indicated to Allied that such action was taken solely as a result of the action of the Commissioner, and none have taken any such action with respect to debtors located in other states. Withdrawal of business by ARCO, Mobil and Shell has reduced Allied's volume of business in the State of Connecticut by more than 50%.

During the more than five years during which Allied has contacted debtors residing in Connecticut, the Commissioner has received a total of six complaints regarding Allied. In each case in which the Commissioner has sought

an explanation from Allied as to the facts of a complaint, a detailed written answer was received. In no case has the Commissioner taken any action with respect to a complaint against Allied after receiving Allied's response. Allied operates in full compliance with the laws of the Commonwealth of Pennsylvania, which do not presently require collection agencies to be licensed as such. Allied has never been required to obtain a license in order to conduct its business with respect to debtors located in any other state, and has no such licenses.

Allied's records are maintained exclusively at its office in Trevose, Pennsylvania, and essentially all of such records have been computerized. Certain of the computer programs used in such record keeping permit information to be segregated on a state-by-state basis, but many do not and Allied does not customarily keep records on that basis. Even where information for a specific state can be obtained, the process is time-consuming and expensive.

B. THE PROCEEDINGS BELOW

On September 14, 1981, the Commissioner issued a Notice of Hearing to Allied, ordering Allied to appear and show cause why it should not be ordered to cease and desist from continuing its business without obtaining a Connecticut license. An Administrative Hearing was held on November 4, 1981, at which time the State Banking Department's Hearing Examiner declined to consider the constitutional issues raised by Allied. This action was then filed in the United States District Court for the District of Connecticut on November 10, 1981, seeking declaratory and injunctive relief. The District Court properly exercised jurisdiction thereof pursuant to 28 U.S.C. 1331 and 1332.

Shortly after the commencement of the action, the Commissioner filed a Motion for Summary Judgment, which was consolidated for argument with Allied's Motion for a Preliminary Injunction. The District Court granted

Summary Judgment in favor of the Commissioner holding, inter alia, that Allied "engaged in substantial intrastate activities." P. App. 25A. The basis for this holding was that although Allied's business was conducted entirely from out-of-state, its business activities produced an impact within the State. Because the District Court regarded Allied as engaged in intrastate commerce, it disregarded the decisions of this Court cited by Allied to the effect that a state cannot impose conditions precedent, in the form of licenses or otherwise, on the right of access to a state of a business engaged wholly in interstate commerce. Instead, the District Court judged the constitutionality of C.G.S. 42-127a(a)(3) on the basis of the balancing test as enunciated by this Court in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), and concluded that the state interests outweighed the burden on interstate commerce.

The District Court further held that the cumulative burden imposed upon a national agency by multiple and inconsistent State licensing provisions did not violate the Commerce Clause, finding that the purpose of the Commerce Clause was to protect interstate markets and not particular interstate firms.

The Court of Appeals affirmed the District Court's grant of Summary Judgment on different grounds. It held that this Court's decisions in *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20 (1974) and other cases, prohibiting a state from imposing conditions on the access of an interstate business, were distinguishable. It further held that the non pre-emption provision of the Fair Debt Collection Practices Act, 15 U.S.C. 1692n, was "more than sufficient to authorize the licensing of interstate debt collection agencies as a method of enforcing otherwise valid regulatory measures." P. App. 12A. While acknowledging that "local interests may be insufficient to justify state legislation which, because it differs from the laws of other states, significantly burdens commerce" and concluding that 15 U.S.C. 1692n does not authorize such multiple or inconsistent state regulation, the Court of Appeals also found that Allied's claim of harm resulting from multiple state regulation was "totally speculative." P. App. 13A.

REASONS FOR GRANTING THE WRIT

A. THE DECISION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT IS IN CONFLICT WITH DECISIONS OF THIS COURT.

1. The Decision Of The Court Of Appeals Is In Conflict With The Line Of Cases Represented By *Allenberg Cotton Co. v. Pittman.*

The decision of the Court of Appeals should be reviewed by this Court because it is in conflict with a series of decisions by this Court, the most recent of which is *Allenberg Cotton Co. v. Pittman, supra.*

In its decision, the Court of Appeals upheld the constitutionality of a Connecticut statute which requires an out-of-state collection agency to obtain a license before communicating with Connecticut debtors exclusively through interstate mail and telephone. In *Allenberg* and the cases preceding it, this Court consistently rejected state attempts to restrict the access of companies engaged wholly in interstate commerce by imposing licensing or domestication requirements. Such requirements have been disallowed without regard to the legitimacy of the state objective sought to be furthered thereby, because licensing has been thought to impose obstacles on the conduct of national commerce beyond the authority of the states to impose — in effect, the national interest in free interstate commerce per se outweighs the interest of a state in using a licensing or domestication requirement as a means of enforcing its laws.

Licensing and domestication have been allowed only in those cases where the in-state activities of an interstate business are such as to fairly allow it to be characterized as "localized." Compare, *e.g.*, *Allenberg* with *Eli Lilly & Co. v. Sav-On Drugs, Inc.*, 366 U.S. 276 (1961), and see L. Tribe, American Constitutional Law 341 at nn. 7-8 (1978). "Localization" has always been held to require some tangible physical presence in the state.

In *Allenberg*, this Court rejected the suggestion that the extent of the burden on commerce imposed by a state's licensing requirement should be balanced against the significance of the state objective in requiring licensing. This case presents no different issue, but presents it in a new context. The licensing requirement sought to be imposed here is directed at collection agencies, not foreign corporations in general or grain dealers as in *Shafer v. Farmers Grain Co.*, 268 U.S. 189 (1925), express companies as in *Adams Express Co. v. New York*, 232 U.S. 14 (1914), or drummers as in *Robbins v. Shelby Taxing District*, 120 U.S. 489 (1887). The result which this Court is asked to review arises from the efforts of the District Court and Court of Appeals to avoid the thrust of this Court's decisions, when applied to a law-abiding business involved in an industry with a poor public image. The reputation of collection agencies is not the issue. The issue is whether this Court's often repeated judgment that states may not erect barriers to the simple access of interstate business is to be preserved.

The Petitioner does not seek freedom from state regulation. Indeed, as a legitimate participant in an industry too often guilty of abuse and misconduct in the past, Allied recognizes that it has much to gain from state regulation of collection practices, vigorously enforced. What Petitioner has sought is simply protection of its exercise of the national privilege to engage in interstate commerce free of state restrictions on its access to the

marketplace. The failure of the courts below to protect this privilege, notwithstanding this Court's consistent support therefor, is the occasion for this Petition.

In *Allenberg*, the plaintiff was a cotton merchant with offices in Tennessee. Through the auspices of an exclusive agent in Mississippi, and occasionally through its own employees, it contracted directly with several Mississippi farmers for the purchase of cotton to be grown in the season to come. Consistent with practice in the industry, it also entered into contracts for the sale of that cotton to other customers outside of Mississippi after the cotton had been ginned, sorted, graded, processed and stored in the state. When Pittman, one of the farmers with whom Allenberg had contracted, refused to deliver the cotton, Allenberg brought suit in Mississippi to enforce its contract.

This Court held Mississippi's "door closing" statute, denying access to the courts of the state to companies transacting business in the state without a Certificate of Authority, to be unconstitutionally applied to Allenberg. After a review of Allenberg's contacts with the State of Mississippi and the cotton marketing system employed nationally, this Court concluded "Appellant's contacts with Mississippi do not exhibit the sort of localization or intrastate character which we have required in situations where a State seeks to require a foreign corporation to qualify to do business." 419 U.S. at 33.

In so holding, this Court relied explicitly on the well-developed exception to the general power of a state to regulate foreign commerce occurring within its borders — that a state cannot, consistently with the Commerce Clause, condition access to its markets upon obtaining of a license or a certificate of authority to conduct business. Justice Frankfurter traced the development of the exception — which he considered "as important and complex as the original doctrine" — to *Pensacola Tel. Co. v. Western*

Union Tel. Co., 96 U.S. 1 (1877). F. Frankfurter, *The Commerce Clause* 64 (1937). Professors Tribe and Antieau recognize its continued vitality today:

> "A license or qualification to do business in the state may *not* constitutionally be required of a corporation that seeks to enter a state solely to engage in exclusively interstate commerce there;" Tribe, *American Constitutional Law* 342 (1978) (emphasis in original).
>
> "The United States Supreme Court has a number of times ruled that a corporation of one state may enter into all other states for all purposes of interstate commerce without obtaining permission of the latter, and that any statute of the second state that attempts to bar or burden the exercise of this national privilege is repugnant to the Commerce Clause and void." 2 Antieau, *Modern Constitutional Law*, §10.35 at pages 71-72 (citations omitted).

The Court of Appeals viewed *Allenberg* in isolation rather than as the latest exposition of this principle. Treating it this way, the Court of Appeals attempted to distinguish *Allenberg* on the ground that "the contacts between Allied's business and Connecticut are significantly different from those involved in *Allenberg.*" (P. App. 7A).

The principal difference identified by the Court of Appeals was that "unlike *Allenberg*, the licensing scheme here is an integral part of a precise regulatory scheme." (P. App. 8A). Petitioner submits that this is a distinction without a difference, and that the Court of Appeals incorrectly characterized licensing as integral to Connecticut's regulatory scheme.

Although state domestication statutes apply to foreign corporations without regard to the business engaged in by each, the state objectives sought to be obtained by domestication are also part of a regulatory scheme. *See* discussion at 419 U.S. 40-1 and *Eli Lilly, supra,* at 284n.1. This Court has not previously distinguished between licensing or domestication of foreign corporations generally, and of specific interstate businesses, and the rationales for this Court's decisions do not suggest that such a distinction is of constitutional dimension.

Less than a year ago, four Justices of this Court agreed that, among its other infirmities, Illinois' tender offer statute was unconstitutional as a direct burden on interstate commerce under the standard set forth in *Shafer v. Farmers Grain Co., supra. Edgar v. Mite Corporation,* 457 U.S. ____, 102 S. Ct. 2629 (1982). In *Shafer,* this Court struck down a North Dakota statute which specifically regulated the buying and shipping of wheat and imposed a license requirement to engage in that business. Similarly, in *Adams Express Co. v. New York,* this Court held:

> " . . . if (the challenged sections of the New York City Charter) are to be deemed to require that a license must be obtained as a condition precedent to conducting the interstate business of an express company, we are of the opinion that as construed they would be clearly unconstitutional." 232 U.S. at 30-31.

In these cases and many others, this Court has refused to allow licensing even when the need for state regulation was clearly established in the context of a "precise regulatory scheme." The rationale of these cases — that the national interest in the free flow of commerce will always take precedence over any state interest in imposing conditions precedent on the conduct of interstate commerce — is equally applicable here.

Nor may Connecticut's licensing provision be fairly characterized as integral to the enforcement of its system of regulation of collection agencies, domestic and foreign. The Commerce Clause prohibits Connecticut from requiring a license of Allied before it can conduct its business in interstate commerce, but the State retains ample means of enforcing its regulations concerning the manner in which that business or any other business is conducted.

The Connecticut statutes regulating the substantive conduct of a collection agency business, and setting forth the remedies available to the Commissioner for a violation thereof, are set forth in P. App. 37A-48A. An agency violating any of the substantive standards set forth in §42-131 can be ordered to cease and desist from violations, and violations of any such order are punishable by contempt, §42-131b. Section 42-131c gives the Commissioner power to seek additional injunctive relief and additional sanctions, and §42-131d explicitly provides that the statutory enforcement measures are in addition to such other remedies as the Commissioner may possess.

Moreover, Congress has adopted, at 15 U.S.C. §1692 et seq., the Fair Debt Collection Practices Act. In explicit and mandatory terms, that statute also defines minimum standards of conduct for collection agencies engaged in both interstate and intrastate commerce. The Federal statute provides for private civil enforcement, with remedies including punitive damages and actual attorneys' fees, and expressly permits class actions. It is enforceable as well by the Federal Trade Commission, which has at its disposal all of the enforcement powers granted to it in the Federal Trade Commission Act. 15 U.S.C. §1692b-1692l; 15 U.S.C. §41 et seq.

In *Castle v. Hayes Freight Lines*, 348 U.S. 61 (1955), the State of Illinois sought to suspend an interstate motor

carrier's right to use Illinois highways for violations of Illinois motor vehicle laws. This Court held that the suspension was inconsistent with the Federal Motor Carrier Act, and responded to the State's argument that suspension was a necessary incident of state regulation as follows:

> "It is urged that without power to impose punishment by suspension states will be without appropriate remedies to enforce their laws against recalcitrant motor carriers. We are not persuaded, however, that the conventional forms of punishment are inadequate to protect states from overweighted or improperly loaded motor trucks." *Id* at 64.

This Court was not persuaded in *Castle* that licensing was an essential part of the State's regulatory scheme, and in light of the other remedies available to the State, licensing can hardly be thought more vital here. Licensing in an instance such as this is simply one of many enforcement tools. While it may be an effective tool, its implications for the free flow of commerce are such that this Court has historically denied states the right to impose such conditions on access of an interstate business, even for valid purposes.

Indeed, the real distinction between this case and *Allenberg* is that the Mississippi statute in *Allenberg* imposed a condition on the access of an interstate business to the courts of the state, while the Connecticut statute here denies access to the State in full unless the license is obtained. Since *Allenberg* and the line of cases it represents make it clear that the legitimacy of the State's objective is not to be balanced against the burden imposed by a particular qualification or licensing statute (the position argued by Justice Rehnquist in dissent in *Allenberg*), the distinction between a statute seeking to impose conditions only on a specific industry and a qualification statute applying to all foreign corporations is not a meaningful one.

The only decision of this Court cited by the Court of Appeals in support of its conclusion concerning the applicability of *Allenberg* to this Statute is *Robertson v. California*, 328 U.S. 440 (1946). Unlike *Allenberg*, however, *Robertson* is not illustrative of a general principle but is essentially unique.

At issue in *Robertson* was the criminal conviction of a resident agent for selling the insurance policies of an Arizona insurer not admitted to engage in an insurance business in California. Robertson's conviction stemmed from his activities within the State of California, and the two statutes under which he was convicted both purported to govern only conduct actually occurring within the State. 328 U.S. at 444-449. This Court did intimate in dictum, however, that if California's right to license an out-of-state insurance company had been at issue, it would have upheld that right. It is not certain to what extent this conclusion rested on the existence of resident agents in the state, but it is clear that it was compelled by the historically unique status of the insurance industry.

Shortly before the acts which led to the criminal conviction in *Robertson*, this Court decided *U.S. v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). In *South-Eastern Underwriters*, this Court held that the insurance business did constitute interstate commerce — thereby limiting what had been generally thought to have been the reach of state regulatory power, and subjecting insurance to the paramount regulation of the federal government.

Congress quickly responded to the *South-Eastern Underwriters* decision, adopting the McCarran-Ferguson Act, 15 U.S.C. 1011 et seq., on March 9, 1945. The effect of that statute was to give congressional consent to State regulation of insurance notwithstanding the limitations of the Commerce Clause. The ability of Congress to so consent was considered and upheld in a companion case to *Robertson* decided the same day, *Prudential Insurance Co.*

v. Benjamin, 328 U.S. 408 (1946). In *Prudential*, the Court referred to that case and the *Robertson* case as "not unexpected sequels" to the *South-Eastern Underwriters* decision, and noted that "No phase (of the process of accomodating state and national power over interstate commerce) has had a more atypical history than regulation of the business of insurance. This fact is important for the problems now presented. Their solution cannot escape its influence." 328 U.S. at 413.

The acts complained of in *Robertson* took place in the interim between the *South-Eastern Underwriters* decision and the adoption of the McCarran-Ferguson Act. This Court in *Robertson* was therefore called upon to determine the status of state regulation during that interim, and indeed of all regulatory actions taken prior to the adoption of the McCarran-Ferguson Act in reliance on the notion that the insurance business was not commerce, and state regulation was therefore free of the restrictions imposed by the Commerce Clause.

The Court was thus confronted with a case which threatened to jeopardize years of uninterrupted and unquestioned State regulation of the insurance industry, while such regulation was believed to be free of Commerce Clause restraints. Attentive to the historically unique status of State regulation of insurance,[1] interrupted briefly by the *South-Eastern Underwriters* decision and restored by the McCarran-Ferguson Act, and focusing on the need for substantive regulation of insurance policies, the Court affirmed the conviction of an agent engaged "in his localized pursuit of this phase of the comprehensive process of conducting an interstate insurance business." 328 U.S. at 448-449 (citation omitted).

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[1]The special status of insurance industry regulation dates at least from *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869). Cf. *Robertson, supra*, at p. 445, n.6.

The case, in short, is so dependent on its particular historical context — in the seam between *South-Eastern Underwriters* and the McCarran-Ferguson Act — and the unique position of the insurance industry that this Court has never cited *Robertson* in any other context or for any more general proposition, notwithstanding many opportunities to do so (e.g., *Allenberg* and *Eli Lilly*), had it been thought to have any application outside the confines of the insurance business.

The Court of Appeals cited no other decision of this Court in support of its attempt to distinguish *Allenberg* and its predecessors. Contrary to its conclusion, these cases do establish a limited per se rule of continuing validity and purpose, which should have governed the result in this case.

2. The Decision Of The Court Of Appeals Is In Conflict With Decisions Of This Court Concerning Congressional Consent To State Legislation Restricting Interstate Commerce.

The Court of Appeals further sought to distinguish *Allenberg* on the basis that Congress had specifically authorized stronger state regulation of collection agencies in the Fair Debt Collection Practices Act, 15 U.S.C. §1692n (P. App. 49A). The conclusion of the Court of Appeals is entirely unsupported by the legislative history of 15 U.S.C. §1692n, however, and so contrary to recent decisions of this Court concerning congressional consent to state action concerning interstate commerce, as to call for this Court's review.

As set forth in *New England Power Co. v. New Hampshire*, ____ U.S. ____, 102 S. Ct. 1096 (1982):

> "The dispositive question ... is whether Congress has in fact authorized the states to impose restrictions of the sort at issue here." ___ U.S. at ___, 102 S. Ct. at 1101.

The legislative history of the Fair Debt Collection Practices Act is silent on the question of state licensing of collection agencies. Far from intending to authorize such licensing, both the House and the Senate seem clearly to have understood that federal legislation concerning debt collection was necessary precisely because the states lacked constitutional authority to compel the domestication of interstate agencies.

Thus, the House Report on the legislation notes that:

> "State laws do not and cannot regulate interstate debt collection practices. The advent of the WATS telephone line has multiplied the number of interstate debt collection abuses. A debt collector can harass a consumer with impunity by calling from one State into another." H. Rep. 131, 95th Congress, First Session, at P. 3.

Similar language is contained in the Senate Report, S. Rep 382, 95th Congress, First Session, at pp. 2-3. Both reports focus on the then-inadequacy of many state laws in defining prohibited practices, on the value of defining federal standards, and on creating a federal private right of action for their violation as a solution to the problem. Neither Report, nor any statement made on the floor of the House or Senate during the consideration of the bill, suggests that licensing was ever considered, let alone intended to be authorized.

Indeed, the District Court specifically found that §1692n was a "standard non pre-emption clause," such as this Court held in *New England Power Co., supra*, should "not ... be construed as an affirmative grant of power to the states to burden interstate commerce in the absence of

an express statement of congressional intent to sustain legislation from attack under the Commerce Clause." (P. App. 28A n.5). In his Brief to the Court of Appeals, the Respondent also specifically conceded that Congress had no such intent.

This Court has recently stated:

> " . . . when Congress has not 'expressly stated its intent and policy' to sustain state legislation from attack under the Commerce Clause, *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 427, 431 (1946), we have no authority to rewrite its legislation based on mere speculation as to what Congress 'probably had in mind.' " *New England Power Co. v. New Hampshire*, ___ U.S. at ___, 102 S. Ct. at 1102-3.

The Court of Appeals' conclusion regarding the effect of 15 U.S.C. §1692n is based on no more than such speculation. Such a casual construction of a standard non pre-emption clause has ramifications beyond the interpretation of the particular statute, and accordingly should invite this Court's review.

B. THE PETITION PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SPECIFICALLY ADDRESSED BY THIS COURT.

Finally, the Court of Appeals concluded that Allied had made an insufficient showing of the cumulative burden imposed by multiple and inconsistent state licensing laws, if Connecticut's provision was upheld, to withstand a motion for summary judgment. That determination, in an important and complex case, contradicts numerous decisions of this Court as well as other Courts of Appeals concerning the permissible scope of a summary judgment.

Among the facts alleged by Allied and assumed true for the purposes of the motion, *Bishop v. Wood*, 426 U.S. 341 (1976), were that Allied conducts business in all fifty states from a single office in Pennsylvania; that its records are computerized and not segregated on a state-by-state basis; that in some instances, state-by-state information cannot be obtained, and in each instance where it can be obtained, the process is lengthy and expensive; and that prior to the action of the Commissioner, Allied had not been compelled to be licensed in any state in which it operates similarly.

At the combined hearing in District Court on Petitioner's Motion for Preliminary Injunction and Respondent's Motion for Summary Judgment, the District Judge indicated he did not wish to hear testimony on any matter concerning the motions. In District Court and in the Court of Appeals, Allied cited the twenty-seven states which at that time specifically required collection agencies to be licensed, and also cited the seven additional states which at that time required licensing more generally or in specific locations within the state. Certain specific provisions of Arizona's licensing statute were also discussed, including the requirements that in order to obtain an Arizona license, each collection agency must maintain an office in the state and a bank account in the state, into which all collections from Arizona debtors must be deposited. The Court of Appeals was invited to take judicial notice of the complexity and variety of the licensing requirements of these states, and had the right and the obligation to do so. 28 U.S.C. §1783.

Allied consistently contended below that multiple state licensing imposes administrative burdens on the conduct of its business as direct if not as immediate as the burdens imposed by the tender offer statute struck down by this Court in *Edgar v. Mite Corporation, supra.* Every agency conducting business in states where it maintains neither offices nor agents will be similarly affected by such

multiple licensing. Since the Court of Appeals agreed that "local interests may be insufficient to justify state legislation which, because it differs from the laws of other states, significantly burdens commerce" (P. App. 13A), and since it did not believe that 15 U.S.C. §1692n could be read to authorize state legislation "which in the aggregate might effectively prohibit interstate debt collection agencies from operating" (P. App. 13A), the Court of Appeals should have remanded the matter to the District Court for a trial on the merits, at which time a fuller showing of the potential disruption of the consumer credit market could and would have been made.

Petitioner recognizes, of course, that this Court does not sit as a Court of Errors. If the only issue presented by the decision of the Court of Appeals was the affirmance of a summary judgment notwithstanding the existence of substantial issues of fact, this Petition would not have been brought. But as this Court has previously held, issues as substantial as those involved in this case should not be resolved by summary procedures where a fuller exposition of facts upon which proper findings can be based would be provided by trial or stipulation of facts. *Askew v. Hargreave*, 401 U.S. 476 (1971) (per curiam); *Kennedy v. Silas Mason Co.*, 334 U.S. 249 (1948). Given the importance of the issues presented here and the paucity of the record on which the District Court and Court of Appeals sought to decide them, the grant of a summary judgment in this case is an important subject for this Court's review.

CONCLUSION

For all of the foregoing reasons, petitioner requests that the petition for a writ of certiorari be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 243—August Term, 1982

(Argued September 1, 1982

Decided November 15, 1982)

Docket No. 82-7468

HERBERT T. SILVER d/b/a ALLIED BOND AND COLLECTION AGENCY,

Plaintiff-Appellant,

—v.—

BRIAN J. WOOLF, IN HIS CAPACITY AS ACTING BANKING COMMISSIONER OF THE STATE OF CONNECTICUT,

Defendant-Appellee.

Before:

LUMBARD, CARDAMONE and WINTER,

Circuit Judges.

Appeal from a grant of summary judgment by the United States District Court for the District of Connecti-

cut, (M. Joseph Blumenfeld, *Judge*, holding that Connecticut may require an interstate debt collection agency to obtain a license as a condition of collecting debts from residents of Connecticut by phone or by mail. Conn. Gen. Stat. Ann. §§ 42-127–42-133a (West Supp. 1982).

Affirmed.

ROBERT N. WIENNER, Hartford, Connecticut (Robert B. Shapiro, Cohn and Birnbaum, P.C., Hartford, Connecticut, of counsel), *for Appellant*.

JOHN G. HAINES, Assistant Attorney General, Hartford, Connecticut (Carl R. Ajello, Attorney General, Hartford, Connecticut, of counsel), *for Appellee*.

WINTER, *Circuit Judge*:

Allied Bond and Collection Agency ("Allied") brought this action against the Banking Commissioner of Connecticut in the District Court for the District of Connecticut, Blumenfeld, *Judge*, seeking declaratory and injunctive relief against the enforcement of Conn. Gen. Stat. Ann. §§ 42-127–42-133a (West Supp. 1982). Allied claimed that this legislation, which requires the licensing of, and otherwise regulates, interstate debt collection agencies is unconstitutional. Judge Blumenfeld granted summary judgment for the Commissioner. We affirm.

BACKGROUND

Allied is a consumer collection agency located in Pennsylvania. It claims to collect debts on behalf of its clients from debtors located in all 50 states and in several United States territories and foreign countries. Allied has no offices, employees, or property in Connecticut and seeks to collect outstanding debts from Connecticut and debtors solely through mail and telephone communications. From 1978 through 1981, Allied had approximately 14,580 accounts in Connecticut on which it collected some $576,415.

Until 1981, Allied's clients included several major oil companies, notably Atlantic Richfield Oil Company (ARCO), Mobil Oil Corporation and Shell Oil Company. In recent years, six Connecticut residents have complained to the Banking Commissioner about Allied's collection activities. Four of the complaints received concerned Mobil, ARCO, and Shell. The Banking Commissioner contacted these companies and informed them that Conn. Gen. Stat. Ann. § 42-131a(b) prohibited creditors from engaging the services of a collection agency which had not obtained a license in Connecticut. That section states in part:

> No creditor shall retain, hire, or engage the services . . . of any person who engages in the business of a consumer collection agency and who is not licensed to act as such by the commissioner, if such creditor has actual knowledge that such person is not licensed . . .

As a result, the three oil companies ceased to engage Allied with respect to debtors located in Connecticut,

thereby reducing Allied's volume of Connecticut accounts by more than 50 percent.

On September 14, 1981, the Commissioner issued a Notice of Hearing ordering Allied to appear and to show cause why it should not be ordered to cease and desist from continuing its business without obtaining a license pursuant to Conn. Gen. Stat. Ann. § 42-127a(a), which reads:

> No person shall act within this state as a consumer collection agency, unless such person holds a license . . . from the commissioner. . . . A consumer collection agency is acting within this state if it . . . (2) has its place of business located outside this state and collects from consumer debtors who reside within this state for creditors whose place of business is located within this state; or (3) has its place of business located outside this state and regularly collects from consumer debtors who reside within this state for creditors whose place of business is located outside this state.

Allied, which does not contest its status as a "consumer collection agency," raised a constitutional challenge to the licensing requirement at the administrative hearing but the hearing examiner declined to consider it. Thereafter, Allied filed this action in the district court seeking a declaration that section 42-127a(a) was unconstitutional on its face and as applied and an injunction against the enforcement of section 42-127a(a) and section 42-131a(b), to the extent the latter might be enforced against Allied's clients. The district court granted the Commissioner's motion for summary judgment and dismissed Allied's complaint. This appeal followed. We affirm.

DISCUSSION

The regulatory scheme of the Connecticut consumer debt collection statute is not complex. Section 42-127a(a) prohibits any person from acting as a consumer collection agency within the state without having first obtained a license from the Banking Commissioner. In order to obtain a license, the debt collection agency must submit a written application, accompanied by a sworn financial statement, aggregate fees of $250, and evidence that the applicant is "of good moral character and financially responsible." Conn. Gen. Stat. Ann. § 42-127a. The Commissioner is empowered to examine a collection agency's books and records in aid of the licensing determination or the enforcement of other aspects of the statutory scheme. An applicant must also post a bond of $5,000 to ensure a true accounting of all funds collected. Conn. Gen. Stat. Ann. § 42-128a. The Commissioner may suspend or revoke a license for cause, after notice and a hearing. Conn. Gen. Stat. Ann. § 42-129a.

Section 42-131 lists certain prohibited practices. For example, a debt collection agency may not furnish legal advice, communicate with debtors in the name of an attorney, or retain or terminate an attorney in any legal action against a debtor on behalf of a creditor without having first received the creditor's written authorization to act as the creditor's agent. No such agency may solicit claims under deceptive or ambiguous contracts, advertise or threaten to advertise to sell claims, or add to any claim an amount in excess of the debtor's legal obligation. Agencies must account to the creditor for all monies collected.

Section 42-131a(a) prohibits a consumer collection agency from violating any portion of the statute's regula-

tory scheme. This section empowers the Banking Commissioner to "examine the affairs of every consumer collection agency in [the] state." Subsection (b) provides that creditors may not knowingly engage the services of an unlicensed consumer collection agency.

Allied asserts two grounds on which the Connecticut legislation is unconstitutional. First, it claims to be an exclusively interstate business with insufficient contacts in Connecticut to require it to obtain a license as a condition of collecting debts from Connecticut residents by phone or by mail. Second, Allied argues that, while the Connecticut licensing requirement and associated regulation of the conduct of debt collection are not burdensome in and of themselves, the "prospect of multiple and probably inconsistent" regulation by a large number of states would so burden firms such as Allied as to make national debt collection from a single office all but impossible. We reject both contentions.

1. *The Licensing Requirement*

Allied's *per se* challenge to the licensing requirement is based almost exclusively upon *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20 (1974). In that case, the Supreme Court invalidated a Mississippi requirement that a Tennessee cotton merchant obtain a Certificate of Authority as a foreign corporation doing business in the state before using state courts to enforce its contracts. The merchant had neither offices nor employees in Mississippi. The underlying contracts were with farmers for cotton to be grown in the future and were an integral part of a national market in cotton futures which allowed merchants such as Allenberg to stabilize their position with respect to future contracts for sale to customers in several states. Notwithstanding the fact that the contracts Allen-

berg sought to enforce were executed in Mississippi and title to the cotton passed upon delivery to a warehouse within that state, the Court held that Allenberg's contacts with Mississippi "do not exhibit the sort of localization or intrastate character," *id.* at 33, necessary to allow a state to condition access to its courts upon qualifying to do business there.

The precise impact of *Allenberg* on other factual situations is not self-evident. While Justice Douglas' opinion is at great pains to describe the "intricate interstate marketing mechanism" in cotton futures, *id.* at 29, and the essentiality to that mechanism of enforceable contracts with farmers for cotton to be grown in the future, it offers few limits to its rationale since a similarly high degree of integration is a ubiquitous feature of modern economies.

Allied is thus able to construct a plausible argument based upon *Allenberg* since it too has no offices or employees in Connecticut and its business is an integral part of the marketing of products on a national scale by national or multinational corporations. The debts it seeks to collect directly affect commerce since defaults upon consumer contracts and costs of collection must affect the price of goods distributed in interstate commerce and, therefore, the amount of that commerce. Nevertheless, we would have to blind ourselves to the many important distinctions between *Allenberg* and the present case were we to reverse solely upon the basis of that decision. These distinctions fall into two categories, either of which alone might be sufficient to uphold the Connecticut statute, both of which together are more than adequate. First, the contacts between Allied's business and Connecitcut are significantly different from those involved in *Allenberg*. Second, unlike the situation in *Allenberg*, Congress has

affirmatively indicated that it considers the kind of state regulation at issue here to be desirable.

Unlike *Allenberg*, the licensing scheme here is an integral part of a precise regulatory scheme. The function of the license is to provide an easy means of enforcing the substantive regulation of debt collection. Thus, a collection agency which violates the regulatory scheme may lose its license and the creditor firms which hire it can then be forced to change agencies. *Allenberg* involved a statute applicable to all foreign corporations without regard to either the nature of their business or the interest of the state in regulating it. The licensing was not an integral part of an otherwise valid regulatory statute and was thus viewed by the majority as a naked restriction on interstate firms. The licensing requirement here, on the other hand, must be viewed as part of an overall regulatory scheme relating to debt collection.[1]

Debt collection practices have long been viewed as a proper matter for regulation by the states. Quite apart from statutory regulation, *see* Scott and Strickland, *Abusive Debt Collection—A Model Statute for Virginia*, 15 Wm. & Mary L. Rev. 567, 573-578 (1974), such practices have generated a substantial amount of state litigation sounding in common law tort. *See generally*, Annot., 64 A.L.R.2d 100 (1959); Annot. 15 A.L.R.2d 108 (1951). Indeed, the principal source of resistance to federal regulation of debt collection has been the view that it is a matter "best left to the states." S. Rep. No. 382 95th Cong., 1st Sess. 9, *reprinted in* 1977 U.S. Code Cong. & Ad. News 1695, 1703 (separate views of Messrs. Schmitt, Gam and Tower). The reason for state involvement in

[1] Allied has explicitly eschewed any particularized challenge to the Connecticut regulatory scheme other than the licensing requirement. We may assume for purposes of this case, therefore, that the regulations and prohibitions of the legislation are constitutional.

such regulation is self-evident. While the methods of communication utilized by debt collectors may, as in Allied's case, be interstate, the perceived abuses and consequent harm—abusive language and threats followed by feelings of insult and humiliation and an urge to pay a disputed debt solely to avoid further harassment—are almost entirely localized.

Moreover, agencies such as Allied are not enforcing their own contracts, as in *Allenberg*. Instead, they generally seek to collect on contracts entered into by companies which have a multitude of contacts with Connecticut. The contracts and resultant debts are entirely local and much of the Connecticut regulation enforced by the licensing requirement effectuates important local interests, *e.g.*, requiring that monies paid to collection agencies be used to satisfy the underlying debts. Conn. Gen. Stat. Ann. §§ 42-131(i),(k),(l). Finally, a requirement that companies doing business in Connecticut not hire unlicensed collection agencies is a method of preventing firms doing business in Connecticut from evading concededly valid regulation of their contract enforcement methods by hiring out-of-state agencies.

Moreover, debt collection practices are intimately related to the use of state courts and the regulation of the practice of law in those courts. Some provisions of the Connecticut statute are explicitly aimed at preventing the illegal practice of law and otherwise regulate the relationship of collection agencies to Connecticut attorneys. *See e.g.*, Conn. Gen. Stat. Ann. §§ 42-131(a),(b),(e). We think *Allenberg* no more prohibits a licensing requirement as a remedy for such regulation of debt collection than it prevents Mississippi from requiring that the Allenberg Cotton Co. hire an attorney licensed or admitted *pro haec vice* in that state to initiate contract actions in its courts.

We believe, therefore, that the local interests served by the use of a licensing mechanism as a regulatory device in the case of the Connecticut statute are significantly different from those at issue in *Allenberg*. Even Justice Rehnquist's dissent in *Allenberg*, for example, mentions as significant local interests only the facilitation of tax collection, ease in service of process and dissemination of financial information. 419 U.S. at 40-41. The majority, however, left open the question of whether Allenberg's contacts were sufficient to allow imposition of local taxes and service of process in Mississippi. Under these circumstances, we decline to read *Allenberg* as establishing a *per se* rule prohibiting the licensing of interstate businesses in order to facilitate the enforcement of an otherwise valid scheme of state regulation. Indeed, this appears to be the substance of the Supreme Court's decisions on the licensing of interstate businesses. *See, e.g., Robertson v. California*, 328 U.S. 440, 452-459 (1946).

Allenberg is distinguishable upon a second ground: in that case, Congress had not expressed any views as to the legitimacy of the Mississippi law; in the present case, there are affirmative indications that Congress believes state regulation of debt collection agencies to be desirable.

That is a crucial distinction for whatever decision a federal court might render as to the validity of a state law regulating commerce in the absence of congressional action, Congressional approval of such laws is decisive in their favor. The power of federal courts to invalidate state laws burdening interstate commerce is derived from the so-called negative implications of the Commerce Clause. Although a matter of some doubt and much debate in earlier times, *see generally* Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67

Yale L.J. 219, 219-223 (1957); Dowling, *Interstate Commerce and State Power*, 27 Va. L.Rev. 1, 2-8 (1940), the power of federal courts to invalidate state laws which "retard, burden or constrict the flow of . . . commerce," *H.P. Hood & Sons v. DuMond*, 336 U.S. 525, 533 (1949) is now well established but subject to a critical qualification stemming from the Commerce Clause. That provision is not a direct prohibition on state action; instead it empowers the federal legislature to regulate the subject matter. As such, it provides, at best, a negative implication supporting such judicial authority. Indeed, one distinguished constitutional scholar has pointed out that "the [negative] textual inference never was a very good one," Black, *Structure and Relationship in Constitutional Law* 21 (1969) and that the disabilities of the states so far as interstate commerce are concerned flow as much from the political structure of a constitution establishing a single nation as from the text of the Commerce Clause. That is a point well taken and one which fully explains judicial invalidation of burdensome or discriminatory state laws where Congress is silent. Nevertheless, the constitutional text empowering Congress is directly relevant so far as the relative powers of different branches of the federal government over such laws are concerned. A state law which a federal court might invalidate where Congress is silent will thus be upheld where Congress has indicated its desire to allow states to act. *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946).

The federal Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692o (Supp. IV 1980) legislates in the same area regulated by the Connecticut statute in issue. It contains the following provision:

> This subchapter does not annul, alter or affect, or exempt any person subject to the provisions of this

> subchapter from complying with the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency. For purposes of this section, a State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection provided by this subchapter.

18 U.S.C. § 1692n.

We regard this provision as more than sufficient to authorize the licensing of interstate debt collection agencies as a method of enforcing otherwise valid regulatory measures. Congress hoped that the states would address the problem of abusive debt collection methods and enact "stronger" laws. S. Rep. No. 382, *supra* p.8, at 6. Unlike statutes such as that at issue in *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27 (1980), involving clauses which preserved only the existing state power in the particular area, section 1692n affirmatively expresses Congress' approval of more stringent state legislation. As we indicate in the next section, section 1692n may not be a *carte blanche* for any and all state legislation, no matter how burdensome or even prohibitive, but it certainly authorizes a simple licensing requirement as a remedial measure in aid of otherwise valid state regulation. Allied has demonstrated no particularly onerous burden imposed by such a requirement but instead has relied upon a *per se* argument based on a literal reading of *Allenberg*. Since *Allenberg* did not involve a federal statute such as section 1692n, it is wholly distinguishable.

2. *The Cumulative Burden of State Regulation*

Allied also argues that, while the Connecticut statutory scheme does not in and of itself impermissibly burden commerce, "the prospect of 30 or more state licenses, each with its own regulatory idiosyncracies, would make the conduct of a national business from a single location impossible. . . ." Brief for Appellant at 24. This argument is quite distinct from the challenge to the licensing requirement. Local interests may be insufficient to justify state lesgislation which, because it differs from the laws of other states, significantly burdens commerce. *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429 (1978) (truck length limits interfering with the "interlining" of interstate trailers); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959) (idiosyncratic mudguard law interfering with "interlining"); *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945) (train limit law forcing interstate trains to be broken up and reformed at the Arizona line). Moreover, while section 1692n authorizes state laws affording "greater . . . protection" to debtors, we are not prepared to say that it authorizes state legislation which in the aggregate might effectively prohibit interstate debt collection agencies from operating.

Appellant's argument fails, however, because it is totally speculative. Apart from arguing that compliance with differing state requirements as to recordkeeping might be prohibitively costly, Allied simply has not designated statutory regulations here or elsewhere which in the aggregate might constitute an impermissible burden on commerce. Unlike *Southern Pacific*, *Bibb*, and *Raymond*, a specific burden resulting from disparate state regulation simply has not been shown. No colorable claim is made, for example, that the cumulative impact of state licensing fees or bonding requirements is prohibitive, that specific

regulatory requirements or prohibitions in the different states are so disparate as to limit interstate operations, or even that Allied itself has been unduly limited in conducting its business as a consequence of state regulation. So far as recordkeeping requirements are concerned, Allied makes no claim that Connecticut even requires particular methods of recordkeeping, much less that such a requirement in connection with the differing requirements of other states is unduly burdensome. Instead, Allied asks us to render the legislation invalid because of "the prospect" of an impermissible aggregate burden on commerce. Courts are not in the business of deciding the legality of such "prospects." Judge Blumenfeld thus properly granted summary judgment.

Affirmed.

EXHIBIT F

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

HERBERT R. SILVER, d/b/a Allied Bond and Collection Agency	:	
v.	:	CIVIL NO. H-81-872
BRIAN J. WOOLF, in his capacity as Acting Banking Commissioner of the State of Connecticut	:	

MEMORANDUM OF DECISION

In this action for a declaratory judgment, the plaintiff, the sole proprietor of a consumer collection agency located in Philadelphia, Pennsylvania, contends that Section 42-127a(a) of the Connecticut General Statutes is unconstitutional on its face and as applied to the plaintiff under the due process and commerce clauses of the United States Constitution.

Conn. Gen. Stat. § 42-127a(a) requires that all consumer collection agencies acting within the State of Connecticut obtain a license from the State Commissioner of Banking. It provides that

> [a] consumer collection agency is acting within this state if it . . . (3) has its place of business located outside this state and regularly collects from consumer debtors who reside within this state for creditors whose place of business is located outside this state.

Id. The plaintiff characterizes his business as a "national collection agency which on behalf of its clients seeks to collect debts from debtors located in all of the 50 states and in a number of U.S. territories and foreign countries." It has no offices, employees or property in Connecticut and seeks to collect outstanding debts from Connecticut debtors solely through mail and telephone communications.

Beginning in July 1980 the Consumer Credit Division of the Connecticut Banking Department received a number of complaints from Connecticut consumer debtors concerning the collection practices of the plaintiff's company. Defendant's Motion for Summary Judgment Exhibits A-1 through A-17. The Department began a correspondence with the plaintiff in order to determine if his company was subject to the licensing requirements of Conn. Gen. Stat. § 42-127a. The plaintiff responded by refusing to provide any information concerning the scope of his activities in Connecticut on the basis of his position that his company was not subject to Connecticut law because its only contacts with the state are by mail and telephone communication. After receiving additional complaints about the plaintiff's company, the Department told the plaintiff that it considered his company subject to the licensing requirements of Conn. Gen. Stat. § 42-127a and began informing the plaintiff's clients that his company was not licensed as required by Connecticut law and that, therefore, referral of accounts to his collection agency for collection from Connecticut debtors is prohibited by Conn. Gen. Stat. § 42-131a(b).[1] Three of the plaintiff's clients have been contacted by the Department so far.

[1]Conn. Gen. Stat. § 42-131a(b) provides:

> No creditor shall retain, hire, or engage the services or continue to retain or engage the services of any person who engages in the business of a consumer collection agency and who is not licensed to act as such by the commissioner, if such creditor has actual knowledge that such person is not licensed by the commissioner to act as a consumer collection agency.

On September 14, 1981 the Banking Department commenced formal proceedings against the plaintiff's company to enforce the licensing requirement. A hearing was held on November 4, 1981, and on March 30, 1982 the Banking Commissioner issued a decision ordering the plaintiff to cease and desist from acting as a consumer collection agency in Connecticut without a license.[2]

On November 10, 1981 the plaintiff filed this action under 42 U.S.C. § 1983 seeking a declaratory judgment that Conn. Gen. Stat. § 42-127a(a) is unconstitutional on its face and/or as applied to the plaintiff. He also seeks an injunction to restrain the Banking Commissioner from (1) enforcing Conn. Gen. Stat. § 42-127a(a) against the plaintiff and (2) enforcing Conn. Gen. Stat. § 42-131a(b) against the plaintiff's clients insofar as it relates to plaintiff's status under Conn. Gen. Stat. § 42-127a(a). The defendant has moved for summary judgment. A hearing was held before this court on January 25, 1982 on the plaintiff's motion for a preliminary and permanent injunction and on the defendant's motion for summary judgment.

The two grounds upon which the defendant urges this court to dismiss this suit without reaching the merits are considered *in limine*.

I. EXHAUSTION OF ADMINISTRATIVE REMEDIES

Although there were state administrative proceedings pending at the time the federal complaint was filed, the fact that the plaintiff did not exhaust his administrative remedies prior to filing this lawsuit does not preclude this court from taking jurisdiction.

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[2]Enforcement of the Banking Commissioner's order has been temporarily enjoined by a temporary restraining order entered by this court on April 12, 1982.

While a plaintiff is generally required to exhaust his administrative remedies prior to commencing an action seeking judicial relief, *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938), the Supreme Court has held on numerous occasions that state administrative remedies need not be exhausted prior to commencing a federal civil rights action under 42 U.S.C. § 1983. *E.g., Ellis v. Dyson*, 421 U.S. 426, 432-33 (1975); *Gibson v. Berryhill*, 411 U.S. 564, 574-75 (1973). In this circuit this line of cases has been interpreted to "mean not that state administrative remedies need never be exhausted prior to commencement of § 1983 suits, but merely that the exhaustion requirement should not be given 'wooden application.' " *Swan v. Stoneman*, 635 F.2d 97, 103 (2d Cir. 1980) (quoting from *Eisen v. Eastmen*, 421 F.2d 560, 569 (2d Cir. 1969), *cert. denied*, 400 U.S. 841 (1970)). Exhaustion is not required where it would be futile because the question of the adequacy of the administrative remedy is "for all practical purposes coextensive with the merits of the plaintiff's constitutional claims," *Fuentes v. Roher*, 519 F.2d 379, 387 (2d Cir. 1975), or where the issue is one where there is no need for the "exercise of agency discretion or expertise," *Touche Ross & Co. v. Securities & Exchange Commission*, 609 F.2d 570, 577 (2d Cir. 1979). In addition, an agency can in some circumstances be found to have waived the exhaustion requirement by stipulation or by adopting a final position prior to completion of the entire administrative process. *Greenberg v. Bolger*, 497 F. Supp. 756, 772 (E.D.N.Y. 1980).

The plaintiff contends that the federal Constitution prevents the state from enforcing its licensing requirement against the plaintiff. His claim is solely one of federal constitutional law on which the agency has no expertise. In addition, the hearing examiner had made it clear prior to the institution of this federal suit that she would not make any decision on the constitutional issues. There is no reason, therefore, to apply the doctrine requiring the exhaustion of administrative remedies.

II. ABSTENTION

The doctrine of equitable restraint requires that a federal court abstain from enjoining pending state enforcement proceedings at least in the absence of extraordinary circumstances, such as bad faith or harassment on the part of the state prosecution, or a facial attack on a patently unconstitutional statute. *Younger v. Harris*, 401 U.S. 37, 53-54 (1971). It has been applied to a variety of state civil proceedings. *E.g., Moore v. Sims*, 442 U.S. 415 (1979) (state proceeding to remove custody of children from their parent); *Trainor v. Hernandez*, 431 U.S. 434 (1977) (enforcement action to attach property pursuant to a state action to recover wrongfully paid welfare benefits); *Juidice v. Vail*, 430 U.S. 327 (1977) (state's contempt process); *Huffman v. Pursue*, 420 U.S. 592 (1975) (state nuisance proceeding). The doctrine is based upon the rationale that principles of equity and federalism preclude a federal court from interfering with an ongoing state proceeding which offers the federal plaintiff a fair forum for the resolution of his federal claims. *See, e.g., Younger v. Harris*, 401 U.S. at 44.

The defendant in this case contends that because the plaintiff has a right to appeal the Banking Commissioner's decision to the state Superior Court under Conn. Gen. Stat. § 4-183 the principles of equitable restraint require this court to abstain in favor of the state's judicial process. The defendant characterizes the administrative appeal afforded by Conn. Gen. Stat. § 4-183 as a continuation of the administrative enforcement proceeding and, therefore, views the state proceedings as ongoing at the present time. In fact, there are no state proceedings pending at the present time. The administrative proceedings before the Banking Commission have been completed. All that remains to be done is the enforcement of the Commissioner's order which has been temporarily restrained by this court. The plaintiff has no state forum in which to pursue his constitutional challenge to this licensing statute unless he chooses to seek

judicial review of the Commissioner's decision under Conn. Gen. Stat. § 4-183.

The fact that the plaintiff has the option of seeking judicial review is not sufficient to require this court to abstain. A federal civil rights plaintiff is not required to exhaust state *judicial* remedies prior to coming to federal court. *E.g., Steffel v. Thompson,* 415 U.S. 452, 472-73 (1974); *Gibson v. Berryhill,* 411 U.S. 564, 574 n.13 (1973). Abstention is not required in this case because there is lacking "the most fundamental requirement for the exercise of equitable restraint[,] . . . the existence of an *ongoing* state proceeding where the federal plaintiff's claims can be heard," *Aristocrat Health Club of Hartford v. Chaucer,* 451 F. Supp. 210, 216 (D. Conn. 1978) (emphasis added).

I turn next to consider the merits.

III. THE MERITS

A. The Propriety of Summary Judgment

The plaintiff challenges the constitutionality of Conn. Gen. Stat. § 42-127a on its face and as applied to the plaintiff's company. The defendant has moved for summary judgment under Rule 56(c) of the Federal Rules of Civil Procedure, the relevant portion of which is set forth in the margin.* Despite his initial concession that this case is "entirely free of material factual dispute," Pre-Hearing Memorandum of the Plaintiff at 26, the plaintiff now attempts to defeat the defendant's motion for summary judgment by characterizing two issues as raising material factual disputes. He contends that (1) a genuine issue of material fact "may exist" as to the extent of plaintiff's contacts with Connecticut and that (2) the magnitude of the burden placed on the plaintiff by enforcement of Connecticut's licensing statute raises a genuine issue of

* "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

material fact. Plaintiff's Statement Re Material Facts in Dispute filed January 19, 1982.

The court finds that no genuine dispute exists as to either of these factual issues and that, therefore, the case is appropriate for resolution by summary judgment. On the question of the extent of the plaintiff's contacts with Connecticut, the plaintiff stipulated at the administrative hearing that "there is a regular course of contact with debtors located in the State of Connecticut conduct[ed] solely by mail and phone calls from the respondent's [the plaintiff herein] office in Philadelphia." Transcript of November 4, 1981 hearing at 19. On the basis of this stipulation, the court finds that there is no disputed factual issue concerning the extent of the plaintiff's contacts with Connecticut. Whether a regular course of contact conducted solely by mail and phone is sufficient to enable the state to subject the plaintiff to its licensing statute is solely a question of law appropriate for resolution by summary judgment.

Despite the plaintiff's assertion to the contrary, there also does not appear to be a significant dispute as to the magnitude of the burden placed upon the plaintiff by this licensing statute. The defendant has submitted an affidavit which clarifies precisely what the Connecticut Banking Department's procedures are in enforcing its licensing statute. The plaintiff has not contradicted these sworn statements that (1) the Connecticut Banking Department does not require a consumer collection agency to convert from a cash basis accounting system to an accrual basis accounting system and that (2) the Department's policy is not to require an inspection of an out-of-state licensee's books and records unless there has been a complaint which resulted in formal proceedings. The extent of the burdens placed on the plaintiff by this licensing statute has been established, and any question concerning whether these burdens can be imposed consistent with the due process and commerce clauses of the United States Constitution is solely an issue of law appropriate for summary judgment.

B. The Commerce Clause

The primary thrust of the plaintiff's constitutional challenge is based upon his contention that Conn. Gen. Stat. § 42-127a(a) imposes an unconstitutional burden on interstate commerce in violation of Article I, § 8 of the United States Constitution. The plaintiff contends that his business as a debt collector is one conducted solely through interstate commerce and that under a doctrine most recently expressed in *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20 (1974), a state cannot condition an interstate business's right of access to its markets by requiring such a business to obtain a license. The defendant argues that such a per se rule is not the law and that at any rate the plaintiff's business is not one involving purely interstate commerce. The defendant asserts that the appropriate standard for judging the constitutionality of Connecticut's licensing scheme is the balancing test enunciated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The plaintiff disagrees that the *Pike* standard applies but argues that, at any rate, Conn. Gen. Stat. § 42-127a(a) cannot be sustained even under such a balancing test.

1. The Applicable Constitutional Standard

The first issue to be resolved is the appropriate legal standard to apply in judging the constitutionality of Conn. Gen. Stat. § 42-127a(a). In most situations, the rule expressed in *Pike v. Bruce Church*, 397 U.S. at 142, applies:

> Where the [state] statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree.

Id. (citations omitted). This standard requires the court to balance the state's interest in the regulation against the burden it imposes on interstate commerce.

The plaintiff cites a line of authority which he reads as requiring a different approach when "purely interstate commerce" is involved. These cases involve situations where a company engaged in purely interstate commerce is required by a state to register as a foreign corporation in order to have access to the state's courts. *Allenberg Cotton Co. v. Pittman,* 419 U.S. 20 (1974); *Eli Lilly & Co. v. Sav-On Drugs,* 366 U.S. 276 (1961) (dictum); *Sioux Remedy Co. v. Cope,* 235 U.S. 197 (1914). The plaintiff reads these cases as establishing an absolute rule precluding a state from requiring that a purely interstate business obtain a license from the state in order to have access to state markets. He characterizes his company as such a purely interstate business and, therefore, concludes that he cannot be subjected to Connecticut's licensing requirement.

The plaintiff's attempt to reduce the problem to the meaning ascribed to the single phrase, "purely interstate commerce," is not supported by *Allenberg Cotton Co. v. Pittman,* 419 U.S. 20. *Allenberg* involved a cotton merchant who purchased cotton from a Mississippi farmer for sale in other states. When the merchant sued the farmer for the contract price in a Mississippi court, his complaint was ultimately dismissed due to his failure to register with the state as a foreign corporation. *Id.* The Court, stressing that the intricate interstate cotton marketing exchange requires federal protection under the commerce clause, held that, despite incidental intrastate aspects, the transaction was one within the "stream of interstate commerce," *id.* at 30, and that, therefore, the state's "refusal to honor and enforce contracts made for interstate or foreign commerce is repugnant to the Commerce Clause," *id.* at 34. Professor Laurence Tribe interprets this case as being

> strongly influenced by the fact that the state . . . seemed to be interfering with the operation of the national futures market in cotton by preventing interstate purchasers who had failed to qualify as "foreign corporations" under local law from effectively protecting themselves against unexpected price increases.

L. Tribe, *American Constitutional Law* 344 (1978). The Court in *Allenberg* was concerned with protecting the interstate commodities market itself. *Allenberg* should not be read to establish a per se rule that bars a state from regulating purely interstate businesses solely because of their interstate character. The Seventh Circuit has interpreted the *Allenberg* line of cases as representing one application of the *Pike* balancing test rather than establishing an absolute rule that state regulation of purely interstate commerce is "void ab initio." *Aldens, Inc. v. LaFollete*, 552 F.2d 752 (7th Cir.), *cert. denied*, 434 U.S. 880 (1977).

In *Eli Lilly & Co. v. Sav-On Drugs*, 366 U.S. 276 (1961), the Court held that although a state cannot require a foreign corporation to obtain a certificate of authority to do business within the state if the corporation's activities are wholly interstate,

> it is equally well settled that if [the corporation] is engaged in intrastate as well as interstate aspects [of its business] the state can require it to get a certificate of authority to do business. In such a situation, [the corporation] could not escape state regulation merely because it is also engaged in interstate commerce.

Id. at 279. In *Eli Lilly* a drug manufacturer which sold goods to wholesalers within New Jersey for subsequent sale in interstate commerce also engaged in service and promotional activities aimed at ultimate consumers of its products who lived in New Jersey. *Id.* The Court held that

the company was engaged in intrastate as well as interstate trade and, as a result of this local aspect of its business, it could be subjected to state regulation. *Id.* at 284.

The plaintiff in the case at bar engaged in substantial intrastate activities. His company performs services for its clients within Connecticut by contacting Connecticut debtors by phone and mail and attempting to collect outstanding debts owed to his clients. The fact that this service is performed exclusively by mail and phone does not alter the fact that it is a service performed intrastate.

> [So] long as the interstate trader's conduct has a "connection in fact" with a state producing an effect within a state, the interstate character of his conduct is only an element of the *Pike* interest-balancing analysis.

Aldens, Inc. v. LaFollette, 552 F.2d 745, 750 (7th Cir.), *cert. denied,* 434 U.S. 880 (1977). The plaintiff's activities in this case have a substantial impact within Connecticut. The manner in which he conducts his business affects the economic, psychological and social well-being of numerous Connecticut citizens. As the United States Congress has declared,

> abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.

15 U.S.C. § 1692. Congress has recognized that the states have an interest in regulating consumer debt collection practices as well as the federal government. 15 U.S.C. § 1692n.[3] Since Congress has recognized the intrastate as

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[3]The federal Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 *et seq.*, although it provides detailed federal regulation of consumer debt

well as interstate nature of the plaintiff's business this court is not inclined to come to any other conclusion. At any event, it is clear that the plaintiff's activities in Connecticut have intrastate or local effects as well as interstate aspects.

2. The Constitutionality of Conn. Gen. Stat. § 42-127a(a) under *Pike v. Bruce Church*

Applying the standard of *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970),[4] the first question which must be resolved is whether Conn. Gen. Stat. § 42-127a(a) discriminates against out-of-state or interstate commerce. A straightforward reading of the statute exhibits no preference or protection of any sort for local as opposed to non-resident collection agencies:

> (a) No person shall act within this state as a consumer collection agency, unless such person holds a license then in force from the commissioner authorizing him to so act. A consumer collection agency is acting within this state if it
>
> > (1) has its place of business located within this state;
> >
> > (2) has its place of business located outside this state and collects from consumer debtors who reside within this state for creditors whose place of business is located within this state; or

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3 continued

collection agencies explicitly states that consistent state legislation is not preempted by the federal statute. 15 U.S.C. § 1692n.

Section 1692 also resolves the supremacy clause issue which was raised by plaintiff's complaint but not argued or briefed.

[4] *See* page 9 *supra*.

> (3) has its place of business located outside this state and regularly collects from consumer debtors who reside within this state for creditors whose place of business is located outside this state.

Conn. Gen. Stat. § 42-127a. Local agencies and out-of-state agencies serving local creditors are subject to the licensing requirement regardless of the extent of their collection activities within Connecticut. Out-of-state agencies collecting on behalf of out-of-state creditors, on the other hand, are subject to the state's regulation only if they regularly collect from Connecticut consumer debtors. Limiting the reach of the statute to such regular contact with the state ensures that (1) the statute embraces only those foreign agencies which have sufficient contacts with Connecticut to sustain the state's regulation under the due process clause, *see International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and (2) that the state has a strong enough interest in the activity being regulated to justify the burden being placed upon interstate businesses, *see Pike v. Bruce Church*, 397 U.S. at 142.

Conn. Gen. Stat. § 42-127a, thus, makes a distinction between intrastate and out-of-state agencies only to the extent required to assure that the statute does not run afoul of the United States Constitution. It imposes equal or greater responsibilities upon domestic collection agencies than it does on out-of-state agencies. I am not confronted, therefore, with a case of "local favoritism or protectionism" imposing disproportionate burdens on out-of-state businesses. *See Lewis v. B.T. Investment Managers, Inc.*, 447 U.S. 27, 42-43 (1980).

Since this statute does not discriminate against interstate commerce, the plaintiff's commerce clause challenge must be resolved by balancing the state's interest against the burden on interstate commerce. *Pike v. Bruce Church*, 397 U.S. at 142. This inquiry requires consideration of three factors:

(1) whether the legislation serves a legitimate local public interest; (2) whether the legislation has only on incidental effect on interstate commerce; and (3) whether the local public interest justifies the statute's impact on interstate commerce.

New England Accessories Trade Ass'n v. Browne, 502 F. Supp. 1245, 1255 (D. Conn. 1980).

In this case the legitimacy of the state's interest is clear. Congress has itself recognized the importance of the states' interest by explicitly providing that the federal Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 *et seq.*, does not preempt the field and that the states, therefore, can regulate consumer collection agencies as long as their regulation is consistent with the federal legislation. 15 U.S.C. § 1692n.[5] In the plaintiff's case, numerous complaints have been made by Connecticut residents to the Banking Commission concerning the plaintiff's company. These facts convincingly demonstrate the significant local public interest which the Commissioner has in restraining fraudulent or unfair trade practices by consumer collection agencies. Reasonable and non-discriminatory legislation

[5]Where Congress has specifically endorsed state regulation, it is possible to conclude that a court need not weigh the state's local interest against the burden on interstate commerce since, in effect, Congress has already done so. *Aldens, Inc. v. Packel*, 524 F.2d 38, 50 (3d Cir. 1975), *cert. denied sub nom Aldens v. Kane*, 425 U.S. 943 (1976). The Supreme Court, however, has indicated that a standard non-preemption clause, such as section 1692n, is not to be construed as an affirmative grant of power to the states to burden interstate commerce in the absence of an express statement of congressional intent to sustain state legislation from attack under the commerce clause. *New England Power Co. v. New Hampshire*, ___ U.S. ___, 50 U.S.L.W. 4223, 4226-27 (Feb. 24, 1982). Although I will not interpret section 1692n as a resolution of the commerce clause issue in this case, it is clearly relevant to several aspects of commerce clause analysis since it represents a precise congressional recognition of the importance of state regulation in this field.

aimed at preventing such practices clearly serves an important and legitimate local public interest.

The extent of the burden imposed upon interstate commerce by Conn. Gen. Sat. § 42-127a(a) has been the subject of a great deal of argument by the parties in this case. The plaintiff argues that the burden is excessive on primarily two grounds. First, he contends that since his company is a national debt collection agency he will be subjected to a licensing requirement in many of the 50 states if this court sustains Connecticut's licensing statute. His second argument is that, in order to obtain a license from the Connecticut Banking Commission he must change significantly the manner in which he maintains his books and records. The defendant contends that the burdens actually imposed upon the plaintiff's company are minimal and justified by the public interests served by this regulation.

The plaintiff's contention that this court must consider the cumulative burden imposed upon a national collection agency, such as the plaintiff's company, by the combined regulation of the several states and the federal government reveals a misunderstanding of the reach of commerce clause protection. He apparently views the commerce clause as a limitation upon the states' power to burden interstate businesses. In fact, the purpose of the commerce clause is to protect interstate commerce itself, *i.e.*, the free flow of goods through interstate markets. *See, e.g., Allenberg Cotton v. Pittman*, 419 U.S. at 29. As the Supreme Court has recently stated, the commerce clause "protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulation." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-28 (1978). A company which seeks to do business in all 50 states must bear the cost of doing business in those states. That cost includes complying with all applicable national and state laws. Congress has recognized that this is a subject matter on which the states may legislate despite the existence of federal regulation. 15 U.S.C. § 1692n. It has implicitly

decided, therefore, that whatever burden on interstate commerce may result from this combination of state and national regulation is justified by the states' interest in regulating this industry.

In any event, the actual burdens imposed upon collection agencies subject to Conn. Gen. Stat. § 42-127a are minimal. The state charges all consumer collection agencies an investigation fee of $50 and a licensing fee of $200. These fees are reasonably related to the costs of investigating, licensing and regulating all licensed agencies. They are "sufficiently small fairly to represent the cost of governmental supervision. . . ." *Union Brokerage Co. v. Jensen*, 322 U.S. 202, 210 (1944). The requirement that a $5,000 bond be posted is more than reasonable. A company which utilizes a cash basis accounting system is not required to convert to or keep additional records based upon an accrual basis accounting system. It is the policy of the Banking Commission to require a collection agency to produce its records and books only in the event that formal proceedings are instituted as a result of a complaint filed by a creditor or debtor. Otherwise, the provision of a financial statement will satisfy the requirement that the Commissioner is entitled to examine a licensee's books and records "as often as he deems necessary." Conn. Gen. Stat. § 42-127a(b). Requiring a company to provide a financial statement is a very minimal burden. Where formal proceedings have been brought against a collection agency the state's interest clearly rises to the extent necessary to justify the production of the company's actual books and records. In summary, whatever minimal burden is imposed upon collection agencies by Connecticut's licensing process is more than justified by the state's interest in regulating the practices of these companies. At any rate, the plaintiff has failed to show how the responsibilities imposed upon collection agencies by Conn. Gen. Stat. § 42-127a in any fashion burdens the interstate credit market.

I conclude, therefore, that whatever minimal burdens, if any, Conn. Gen. Stat. § 42-127a may impose upon interstate commerce when it is applied to a national consumer debt collection agency such as the plaintiff's are more than justified by the considerable state interests served by this regulation. Requiring an out-of-state agency which regularly collects from debtors within the state to obtain a license from the State Banking Commissioner is a reasonable component of Connecticut's regulatory scheme. In view of Congressional recognition of the importance of the states' interest in regulating this industry, and the fact that Conn. Gen. Stat. § 42-127a(a) does not substantially burden interstate commerce, the plaintiff's commerce clause challenge must fail.

C. The Due Process Clause

The plaintiff also claims that his company has insufficient contact with the State of Connecticut to allow the state to regulate its activities consistent with the requirements of due process.

Due process limitations upon a state's power to exercise jurisdiction over non-residents are usually discussed in the context of challenges to a state court's assumption of jurisdiction over the persons of out-of-state defendants. *E.g., International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Hanson v. Denckla*, 357 U.S. 235 (1958). It is true, as the plaintiff states, that the due process clause also limits the power of a state to subject a non-resident to regulation under its substantive laws. The plaintiff, however, contends that a more stringent test applies in the later situation. He cites state authority to the effect that

> the question of whether a foreign corporation is transacting business so as to require a certificate of authority must be determined on the complete factual picture presented in each case, and . . . the

> corporation's activities must be more substantial than those which would suffice to subject it to service of process.

Sawyer Savings Bank v. American Trading Co., 176 Conn. 185, 190, 405 A.2d 635 (1978) (citations omitted). In that case, however, the Connecticut Supreme Court was merely interpreting a statutory test of what constitutes the transaction of business within the state under state law. *Id.* at 188. The case does not support the plaintiff's position that due process requires more contact with a state to sustain a state's substantive regulatory jurisdiction than to support a state court's *in personam* jurisdiction.

As pointed out by Justice Douglas' concurring opinion in *Travelers' Health Ass'n v. Virginia*, 339 U.S. 643 (1950), there may be some distinction between the constitutional standard applied in a case of substantive state regulation and that applicable to a question of a court's *in personam* jurisdiction:

> [A creditor's] ability to sue [an out-of-state company in Virginia] is not necessarily the measure of Virginia's power to regulate. . . . It is the nature of the state's action that determines the kind or degree of activity in the state necessary for satisfying the requirements of due process. What is necessary to sustain a tax or to maintain a suit by a creditor . . . is not in my view determinative when the state seeks to regulate . . . within its borders.

Id. at 653. But whether or not the limitations of due process as applied to a state court's ability to assert *in personam* jurisdiction are equated with those applicable to the power of the state to apply its substantive regulatory jurisdiction over non-residents, as can be implied from the majority opinion in *Travelers Health Ass'n v. Virginia*, 339 U.S. at 648, the requirements of due process are certainly met in this case.

In addressing a due process challenge to a state's assertion of regulatory jurisdiction over out-of-state discount securities brokers Judge Merhige of the Eastern District of Virginia stated that

> [t]he determination as to the state's power, under the due process clause, to regulate the activities of non-residents is made by reference both to the extent of the non-resident's contact with the state, and to the nature and extent of the state's interest in exercising its authority.

Underhill Assoc., Inc. v. Coleman, 504 F. Supp. 1147, 1150 (E.D. Va. 1981). The plaintiffs in the *Underhill* case had an even stronger due process argument than the plaintiff at bar because there the securities brokers did not themselves initiate contact with state residents. Here it is the plaintiff who initiates contact. In both cases the sole means of contact between the out-of-state companies and state residents was by phone and mail. I, therefore, find Judge Merhige's reasoning persuasive and follow his lead in concluding that

> [f]or due process purposes, it sufficies that plaintiffs' activities within the state produce effects within [Connecticut] - effects which the state has an interest in regulating.

Id.

The plaintiff in this case contacts an average of approximately 3,000 Connecticut debtors annually. The plaintiff stipulated at the administrative hearing before the state agency that his company contacts Connecticut debtors regularly and with some frequency. Such regular conduct of business within Connecticut produces substantial local effects. *See* 15 U.S.C. §§ 1692, 1692n. The state's interest in subjecting plaintiff's company to its licensing

regulation, therefore, is sufficient to sustain the statute against both a commerce clause and a due process challenge.

IV. CONCLUSION

For the reasons stated above, I hereby grant the defendant's motion for summary judgment and dismiss the case. It is

SO ORDERED.

Dated at Hartford, Connecticut, this 6th day of May, 1982.

/s/ M. Joseph Blumenfeld
M. Joseph Blumenfeld
Senior United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

HERBERT R. SILVER, d/b/a Allied Bond and Collection Agency	:	
v.	:	
BRIAN J. WOOLF, in his capacity as Acting Banking Commissioner of the State of Connecticut	:	CIVIL ACTION NO. H-81-872

JUDGMENT

This action having come on for consideration of the Defendant's Motion for Summary Judgment before the Honorable M. Joseph Blumenfeld, Senior United States District Judge; and,

The Court having considered the Motion and all papers filed in support of and in opposition to the Motion, and the Court having filed its Memorandum of Decision on May 6, 1982, granting the Defendant's Motion for Summary Judgment,

It is accordingly ORDERED, ADJUDGED and DECREED that Judgment be and is hereby entered in favor of the Defendant, dismissing the Plaintiff's Complaint.

Dated at Hartford, Connecticut, this 7th day of May, 1982.

SYLVESTER A. MARKOWSKI
Clerk, United States District Court

By: /s/ John K. Henderson, Jr.
John K. Henderson, Jr.
Deputy-in-Charge

§ 42-127. Consumer collection agency. Definitions

The following terms, as used in sections 42-127 to 42-133, inclusive, shall have the following meanings, unless a different meaning is clearly indicated from the context:

(a) "Person" means and includes individuals, partnerships, associations and corporations;

(b) "Consumer collection agency" means any person engaged in the business of collecting or receiving for payment for others of any account, bill or other indebtedness from a consumer debtor, including any person who, by any device, subterfuge or pretense, makes a pretended purchase or takes a pretended assignment of accounts from any other person of such indebtedness for the purpose of evading the provisions of sections 42-127 to 42-133a, inclusive. It includes persons who furnish collection systems carrying a name which simulates the name of a consumer collection agency and who supply forms or form letters to be used by the creditor, even though such forms direct the consumer debtor to make payments directly to the creditor rather than to such fictitious agency. It further includes any person, firm or corporation which, in attempting to collect or in collecting his or its own accounts or claims, from a consumer debtor, uses a fictitious name or any name other than his or its own name which would indicate to the consumer debtor that a third person is collecting or attempting to collect such account or claim. It shall not include individuals regularly employed for a regular wage or salary upon the staff or as employees of any person not engaged in the business of consumer collection agency, banks, lenders licensed by the banking commissioner under chapter 647, abstract companies doing an escrow business, real estate brokers or companies conducting a railway express business subject to the supervision of the department of public utility control, any public officer or person acting under order of court, any member of the bar of this state or any person appointed by or acting for any

public service company, provided any such person so appointed and so acting is not authorized to initiate or make any collection efforts;

(c) "Commissioner" means the banking commissioner of the state;

(d) "Consumer debtor" means any natural person, not an organization, who has incurred indebtedness for personal, family or household purposes;

(e) "An organization" means a corporation, partnership, association, trust or any other legal entity or an individual operating under a trade name or a name having appended to it a commercial, occupational or professional designation;

(f) "Creditor" is a person who retains, hires, or engages the services of a consumer collection agency.

(1967, P.A. 882, § 19, eff. Jan. 1, 1968; 1971, P.A. 539, § 1; 1975, P.A. 75-486, § 64, eff. Dec. 1, 1975; 1977 P.A. 77-614, § 162, eff. Jan. 1, 1979; 1978, (P.A. 78-226, § 1; 1978, P.A. 78-303, § 54, eff. Jan. 1, 1979; 1980, P.A. 80-482, § 333, eff. July 1, 1980.)

§ 42-127a. License required. Application, issuance, renewal. Examination of records

(a) No person shall act within this state as a consumer collection agency, unless such person holds a license then in force from the commissioner authorizing him so to act. A consumer collection agency is acting within this state if it

(1) has its place of business located within this state;

(2) has its place of business located outside this state and collects from consumer debtors who reside within this state for creditors whose place of business is located within this state; or

(3) has its place of business located outside this state and regularly collects from consumer debtors who reside within this state for creditors whose place of business is located outside this state.

(b) Any person desiring to act within this state as a consumer collection agency shall make a written application to the commissioner for such license in such form as the commissioner prescribes. Such application shall be accompanied by a financial statement prepared by a certified public accountant or a public accountant, the accuracy of which is sworn to under oath before a notary public by the proprietor, a general partner, or a corporate officer duly authorized to execute such documents, and a license fee of two hundred dollars and an investigation fee of fifty dollars, such license fee to be returned if the license is not granted. The commissioner shall cause to be made such inquiry and examination as to the qualifications of each such applicant as he deems necessary. Each applicant shall furnish satisfactory evidence to the commissioner that he is a person of good moral character and is financially responsible. Upon satisfying himself that such applicant is in all respects properly qualified and trustworthy and that the

granting of such license is not against the public interest, the commissioner may issue to such applicant a license, in such form as he may adopt, to act within this state as a consumer collection agency. Any such license issued by the commissioner shall be in force only until the first day of May following the date thereof, but may be reissued by the commissioner, in his discretion and without formality other than proper application accompanied by a renewal fee of two hundred dollars and satisfactory proof that such applicant at that time possesses the required qualifications for license. To further the enforcement of this section and to determine the eligibility of any person holding a license, the commissioner may, as often as he deems necessary, examine his books and records, and may, at any time, require a licensee to submit such a financial statement for the examination of the commissioner, so that he may determine whether the licensee is financially responsible to carry on a consumer collection agency business within the intents and purposes of sections 42-127 to 42-133a, inclusive. Any financial statement submitted by a licensee shall be confidential and not public record unless introduced in evidence at a hearing conducted by the commissioner.

(c) No person, partnership, association or corporation licensed to act within this state as a consumer collection agency shall do so under any other name or at any other place of business than that named in the license. Not more than one place of business shall be maintained under the same license but the commissioner may issue more than one license to the same licensee upon compliance with the provisions of this chapter as to each new licensee. Any licensee holding, applying for, or seeking renewal of more than one license may, at its option, file the bond required under section 42-128a separately for each place of business licensed, or to be licensed, or a single bond, naming each place of business, in an amount equal to five thousand dollars for each place of business.

(1971, P.A. 539, §§ 2, 3; 1973, P.A. 73-284; 1973, P.A. 73-328; 1973, P.A. 73-341; 1981, P.A. 81-292, § 12.)

§ 42-131. Prohibited practices

No consumer collection agency shall: (a) Furnish legal advice or perform legal services or represent that it is competent to do so, or institute judicial proceedings on behalf of others; (b) communicate with debtors in the name of an attorney or upon the stationery of an attorney, or prepare any forms or instruments which only attorneys are authorized to prepare; (c) purchase or receive assignments of claims for the purpose of collection or institute suit thereon in any court; (d) assume authority on behalf of a creditor to employ or terminate the services of an attorney unless such creditor has authorized such agency in writing to act as his agent in the selection of an attorney to collect the creditor's accounts; (e) demand or obtain in any manner a share of the proper compensation for services performed by an attorney in collecting a claim, whether or not such agency has previously attempted collection thereof; (f) solicit claims for collection under ambiguous or deceptive contract; (g) refuse to return any claim or claims upon written request of the creditor, claimant or forwarder, which claims are not in the process of collection after the tender of such amounts, if any, as may be due and owing to the agency; (h) advertise or threaten to advertise for sale any claim as a means of forcing payment thereof, unless such agency is acting as the assignee for the benefit of creditors; (i) refuse or fail to account to its clients for all money collected within sixty days from the last day of the month in which said money is collected; (j) refuse or intentionally fail to return to the creditor all valuable papers deposited with a claim when such claim is returned; (k) refuse or fail to furnish at intervals of not less than ninety days, upon the written request of the creditor, claimant or forwarder, a written report upon claims received from such creditor, claimant or forwarder; (*l*) commingle money collected for a creditor, claimant or forwarder with its own funds or use any part of a creditor's, claimant's or forwarder's money in the conduct of its business; (m) add any charge or fee to the amount of any claim which it receives for collection unless

the consumer debtor is legally liable therefor, in which case, the charge or collection fee may not be in excess of fifteen per cent of the amount actually collected on the debt; (n) use or attempt to use or make reference to the term "bonded by the state of Connecticut," "bonded" or "bonded collection agency" or any combination of such terms or words, except that the word "bonded" may be used on the stationery of any such agency in type not larger than twelve-point; or (o) engage in any activities prohibited by sections 42-127 to 42-133a, inclusive.

(1971, P.A. 539, § 8; 1981, P.A. 81-183.)

§ 42-131a. Prohibited practices within and without state. Examination of affairs

(a) No consumer collection agency shall engage in this state in any practice which is prohibited in section 42-131 or determined pursuant to sections 42-131b and 42-131c to be an unfair or deceptive act or practice, nor shall any consumer collection agency engage outside of this state in any act or practice prohibited in said section 42-131. The commissioner shall have power to examine the affairs of every consumer collection agency in this state in order to determine whether it has been or is engaged in any act or practice prohibited by sections 42-131 to 42-131c, inclusive.

(b) No creditor shall retain, hire, or engage the services or continue to retain or engage the services of any person who engages in the business of a consumer collection agency and who is not licensed to act as such by the commissioner, if such creditor has actual knowledge that such person is not licensed by the commissioner to act as a consumer collection agency.

(1971, P.A. 539, § 7; 1978, P.A. 78-226, § 2.)

§ 42-131b. Hearing. Cease and desist order. Subpoenas. Appeal. Penalty for violation of order

(a) Whenever the commissioner has reason to believe that any person has been engaged, or is engaging, in violation of sections 42-131 to 42-131c, inclusive, in any act or practice prohibited in section 42-131 and that a proceeding by him in respect thereto would be to the interest of the pubic, he shall issue and serve upon such person a notice, in the form required under subsection (b) of section 4-177, of a hearing thereon to be held at a time and place fixed in the notice, which shall not be less than thirty days after the date of the service thereof. At the time and place fixed for such hearing, such person shall have an opportunity to be heard and to show cause why an order should not be made by the commissioner requiring such person to cease and desist from the acts, methods or practices so complained of. Upon good cause shown, the commissioner shall permit any person to intervene, appear and be heard at such hearing by counsel or in person. The commisssioner, upon such hearing, may administer oaths, examine and cross-examine witnesses and receive oral and documentary evidence, and shall have the power to subpoena witnesses, compel their attendance and require the production of books, papers, records, correspondence or other documents which he deems relevant to the inquiry. In case of a refusal of any person to comply with any subpoena issued hereunder or to testify with respect to any matter concerning which he may be lawfully interrogated, the superior court for the judicial district of Hartford-New Britain or for the judicial district where such person resides, on application of the commissioner, may issue an order requiring such person to comply with such subpoena and to testify; and any failure to obey any such order of the court may be punished by the court as a contempt thereof. Statements of charges, notices, orders and other processes of the commissioner under sections 42-131 to 42-131c, inclusive, may be served in the manner provided by law for service of process in civil actions.

(b) If, after such hearing, the commissioner determines that the act or practice in question is defined in section 42-131 and that the person complained of has engaged in such act or practice in violation of sections 42-131 to 42-131c, inclusive, he shall reduce his findings to writing and shall issue and cause to be served upon the person charged with the violation an order requiring such person to cease and desist from engaging in such act or practice.

(c) Repealed. (1981, P.A. 74-254, § 11.)

(d) No order of the commissioner under sections 42-131 to 42-131c, inclusive, shall relieve or absolve any person affected by such order from any liability under any other laws of this state.

(e) Whenever any person violates a cease and desist order of the commissioner made pursuant to this section, the commissioner may bring an action, through the attorney general, for contempt in the superior court for the judicial district of Hartford-New Britain. Upon proof of the violation to the satisfaction of the court, such person shall be ordered by the court to forfeit and pay to the state a sum not to exceed fifty dollars for each violation, except that, for each violation found by the court to be wilful, the amount of such penalty shall be a sum not to exceed five hundred dollars.

(1971, P.A. 539, § 9; 1972, P.A. 108, § 9, eff. Sept. 1, 1972; 1974, P.A. 74-254, §§ 9, 11; 1976, P.A. 76-436, § 638, eff. July 1, 1978; 1978, P.A. 78-226, § 3; 1978, P.A. 78-280, §§ 1, 5, eff. July 1, 1978.)

§ 42-131c. Unfair or deceptive practices. Hearing. Injunction

(a) Whenever the commissioner has reason to believe that any consumer collection agency is engaging in this state in any act or practice in the conduct of such business which is not defined in section 42-131, that such act or practice is unfair or deceptive and that a proceeding by him in respect thereto would be to the interest of the public, he may issue and serve upon such person a notice, in the form required under subsection (b) of section 4-177, of a hearing thereon to be held at a time and place fixed in the notice, which shall not be less than thirty days after the date of the service thereof. Each such hearing shall be conducted in the same manner as the hearings provided for in section 42-131b. The commissioner shall, after such hearing, make a report in writing in which he shall state his findings as to the facts, and he shall serve a copy thereof upon such person. If such report charges a violation of sections 42-131 to 42-131c, inclusive, and if such act or practice has not been discontinued, the commissioner may, through the attorney general, at any time after ten days after the service of such report, cause a petition to be filed in the superior court for the judicial district wherein the person resides or has his principal place of business, to enjoin and restrain such person from engaging in such method, act or practice. The court shall have jurisdiction of the proceeding and shall have power to make and enter appropriate orders in connection therewith and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public pendente lite. If the court finds that the act or practice complained of is unfair or deceptive, that the proceeding by the commissioner with respect thereto is to the interest of the public and that the findings of the commissioner are supported by the weight of the evidence, it shall issue its order enjoining and restraining the continuance of such method of competition, act or practice.

(b) Whenever any person acts within this state as a consumer collection agency and does not hold a license then in force from the commissioner authorizing him so to act, the commissioner may bring an action, through the attorney general, in any court of competent jurisdiction to enjoin such person from acting within this state as a consumer collection agency. Upon a proper showing, a permanent or temporary injunction or restraining order shall be granted. The court shall not require the commissioner to post a bond.

(1971, P.A. 539, § 10; 1974, P.A. 74-254, § 10; 1978, P.A. 78-226, § 4; 1978, P.A. 78-280, § 2, eff. July 1, 1978.)

§ 42-131d. Commissioner's powers

The powers vested in the commissioner by sections 42-131 to 42-131c, inclusive, shall be additional to any other powers to enforce any penalties, fines or forfeitures authorized by law with respect to the methods, acts and practices prohibited or declared to be unfair or deceptive, and the commissioner may issue such regulations as may be necessary for the conduct of the consumer collection agency business.

(1971, P.A. 539, § 11; 1973, P.A. 73-428.)

§ 1692n. Relation to State laws

This title does not annul, alter, or affect, or exempt any person subject to the provisions of this title from complying with the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of this title, and then only to the extent of the inconsistency. For purposes of this section, a State law is not inconsistent with this title if the protection such law affords any consumer is greater than the protection provided by this title.

(May 29, 1968, P. L. 90-321, Title VIII, § 816, as added Sept. 20, 1977, P. L. 95-109, 91 Stat. 874.)

No. 82-1363

In the Supreme Court of the United States

OCTOBER TERM, 1982

HERBERT R. SILVER, d/b/a
Allied Bond and Collection Agency

Petitioner

v.

BRIAN J. WOOLF, *In His Capacity as Acting Banking Commissioner of the State of Connecticut*

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT, BRIAN J. WOOLF, IN HIS CAPACITY AS ACTING BANKING COMMISSIONER OF THE STATE OF CONNECTICUT

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QUESTIONS PRESENTED

1. Whether §42-127a(a)(3) of the Connecticut General Statutes requiring out-of-state collection agencies which regularly collect from Connecticut debtors for out-of-state creditors to obtain a license is a *per se* violation of the Commerce Clause.

2. Whether the Connecticut license statute is within the permitted scope of the Federal Fair Debt Collection Practices Act provision allowing the states to pass stricter laws for the protection of debtors.

3. Whether summary judgment was properly granted where Petitioner alleged that multiple and inconsistent state laws would unduly burden interstate commerce but did not show that it was subject to any such laws.

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The Respondent, Brian J. Woolf, Banking Commissioner of the State of Connecticut, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Second Circuit's opinion in this case. The opinions below are reported at 538 F.Supp. 881 (D. Conn. 1982) and 694 F.2d 8 (2nd Cir., 1982) and are printed in Petitioner's Appendix at pages 1A and 15A.

STATEMENT OF THE CASE

On the basis of the Commerce Clause, the Petitioner ("Allied") challenges §42-127a (a) (3), C.G.S., which requires an out-of-state consumer collection agency to obtain a license from the Respondent ("Commissioner") if it regularly collects from Connecticut consumer debtors on behalf of creditors whose place of business is located outside the state. Allied also sought to enjoin the Commissioner's application of the major enforcement mechanism of the State's regulatory scheme, §42-131a (b), C.G.S., which prohibits creditors from using unlicensed collection agencies.[1]

The dispute arose when, from July 1980 to January 1982, six complaints were filed by Connecticut consumer debtors with the State Banking Department regarding Allied's collection activities. The creditors in four of these complaints were major oil companies (Mobil, ARCO, and Shell), and the complaints involved the use of their credit cards in the state. The Banking Department investigated each complaint and, mindful of the requirements of the licensing statute, also sought to determine whether Allied "regularly" made collections from Connecticut consumer debtors. While Allied responded to the Department's questions regarding the specific complaints, it consistently refused to disclose the scope of its activities in Connecticut claiming that it was a national collection agency based in Pennsylvania, that it had no office or employees in Connecticut, and that it was not subject to regulation by Connecticut. Allied's recalcitrance eventually led to an administrative cease and desist order and a hearing to determine whether it required a license.

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[1]The referenced statutes are set out in full in Petitioner's Appendix, pp. 37A-48A.

At the State administrative hearing, Allied raised its constitutional challenge, but the hearing officer declined to rule on it. Allied then commenced its federal action to which the Commissioner filed a motion for summary judgment. The documents filed in support of the State's motion showed that from 1978 through 1981 Allied had 14,580 accounts (debtors) in the State of Connecticut rising from 921 in 1978 to 5,025 in 1981 and that, during that period, Allied collected $576,415.35 from Connecticut debtors. Further, countering Allied's bald assertions of oppressive regulation, the Commissioner showed that the requirements for a license are minimal, that no changes would be required in Allied's bookkeeping methods, and that Allied would only be required to produce its records if formal proceedings were commenced as the result of a complaint.

In the District Court Allied attempted to characterize itself as a purely interstate trader and claimed that the licensing statute barred its access to the state. Relying almost exclusively on this Court's decision in *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20 (1974), Allied argued that the requirement of a license was a *per se* violation of the Commerce Clause. The District Court (Blumenfeld, J.) easily distinguished *Allenberg* and found that Allied's regular contracts with Connecticut debtors, albeit by mail and telephone, which directly impact "the economic, psychological and social well being of numerous Connecticut citizens," (P.App., 25A), constituted substantial intrastate activities. The Court then considered the State regulatory scheme under the test enunciated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), finding it non-discriminatory and the burdens imposed by the scheme to be "minimal." (P.App., 30A).

In applying the *Pike* balancing test, the Court noted the federal Fair Debt Collection Practices Act, 15 U.S.C. §1692,

et seq., and particularly 15 U.S.C. §1692n (P.App., 49A), which allows the states to pass stricter laws for the protection of debtors. While characterizing §1692n as a standard non-preemption clause, the Court considered it persuasive on the issue of the legitimacy of the State's interest in regulating. Finally, Allied claimed that the Court must consider the cumulative burden of multiple and inconsistent state licensing provisions. Since Allied did not show that it was subject to any such regulation, the Court gave little credence to this claim noting that the Commerce Clause protects interstate commerce not particular interstate firms. The Court then granted the motion for summary judgment.

On appeal Allied conceded that Connecticut's licensing statute was not burdensome. It continued to claim, however, that under *Allenberg Cotton Co. v. Pittman*, *supra*, the requirement of a license is a *per se* violation of the Commerce Clause and that "the prospect of multiple and probably inconsistent" multi-state regulation would be unduly burdensome. (P.App., 6A). The Circuit Court distinguished *Allenberg* on two grounds: (1) that Connecticut's comprehensive regulatory scheme and Allied's debt collection business are significantly different from the naked restriction on interstate commerce in *Allenberg*, and (2) that, unlike *Allenberg*, Congress had "affirmatively indicated that it considers the kind of state regulation at issue here to be desirable." (P.App., 7A-8A).

With regard to the "prospect" of "probably" inconsistent state regulation, the Court held that while the regulatory scheme is within the permitted scope of §1692n, authorizing state laws which afford greater protection to debtors, that section would not authorize state laws which in the aggregate would effectively prohibit the operation of interstate debt collection agencies. Since there was no evidence of any such

prohibitive state laws, however, the Court dismissed the claim holding that "Courts are not in the business of deciding such prospects." (P.App. 14A).

SUMMARY OF ARGUMENT

1. Requiring a consumer collection agency which has no offices or employees in Connecticut to obtain a license from the State is not a *per se* violation of the Commerce Clause where the agency regularly collects from Connecticut consumer debtors, where there is no claim that the licensing requirement is protectionist or unduly burdensome, and where Congress has provided that the states may pass stricter provisions for the protection of consumer debtors than provided by federal laws. Allied's claim that the Circuit Court's failure to find such a *per se* violation is in conflict with a line of decisions by this Court represented by *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20 (1974), is without merit in that the facts of this case are distinctly different than the naked restriction on commerce in *Allenberg*.

2. The Circuit Court found that the state licensing statute is within the scope of the provision of the federal Fair Debt Collection Practices Act allowing the states to pass stricter laws for the protection of consumer debtors. Allied's argument that this ruling conflicts with this Court's decision in *New England Power Co. v. New Hampshire*, ——— U.S. ———, 102 S.Ct. 1096 (1982), is unsupported in that the federal statute here is broader than the mere "savings clause" in *New England Power*. Further, the state statute involved in *New England Power* was found to be protectionist and there is no such claim in the present case.

3. The Circuit Court correctly found that where Allied made no claim that it is subject to licensing in any other state, consideration of the possible burdens imposed by multi-state regulation is hypothetical.

4. The present case presents no issue requiring settlement by this Court where the case was decided under the principles set out in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970); where Allied has made no claim that the Connecticut statute by itself causes it any harm; and where no national interest has been offended by the statute.

REASONS FOR DENYING THE WRIT

A. THERE IS NO CONFLICT WITH ANY DECISION OF THIS COURT OR ANY FEDERAL COURT OF APPEALS.

Allied's argument is limited to the claim that the Circuit Court's decision is in conflict with a line of cases represented by *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20 (1974), and this Court's decision in *New England Power Co. v. New Hampshire*, ——— U.S. ———, 102 S.Ct. 1096 (1982). There is no claim that the decision conflicts with that of any other federal court of appeals.

1. No Conflict with *Allenberg Cotton Co. v. Pittman*

Allied continues to argue on the basis of *Allenberg* that the requirement of a license here is a *per se* violation of the Commerce Clause. Admittedly, some state actions may so clearly burden interstate commerce as to be "virtually" *per se* invalid, *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1977), but the mere fact of a license, by itself, has never been held to be such a *per se* violation. See *Robertson v. California*, 328 U.S. 440, 458-459 (1946). Allied's argument posits a wooden view of the negative implications of the Commerce Clause and ignores the facts which are of paramount importance in resolving such controversies. *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 420-421 (1945).

Both lower Courts easily distinguished *Allenberg*. In that case this Court invalidated a Mississippi requirement barring a Tennessee cotton merchant from using the Mississippi courts to enforce a contract without obtaining a certificate of authority to do business there. The merchant had no offices or employees in Mississippi but contracted with farmers in that state for the future delivery of their crops with title

passing upon delivery to a local warehouse. Notwithstanding these contacts, the Court viewed the transaction as being within the "stream of commerce" and not sufficiently local to allow a state to bar access to its courts for the enforcement of contracts without qualifying to do business there. The major thrust of the Court's decision, however, was that if such contracts could not be enforced, it would totally disrupt the national commodity futures market.

The other cases on which Allied relies involve similar direct burdens on interstate commerce where little or no legitimate state interests were implicated. See, e.g., *Robbins v. Shelby Taxing District*, 120 U.S. 489 (1887) [Tax on drummers for interstate sale of goods]; *Shafer v. Farmers Grain Co.*, 268 U.S. 189 (1924) [direct and burdensome regulation of interstate grain sales]; *Adams Express Co. v. New York*, 232 U.S. 14 (1914) [burdensome licensing scheme for common carriers engaged in interstate shipment of goods]; *Edgar v. Mite Corporation*, ——— U.S. ———, 102 S.Ct. 2629 (1982) [direct and burdensome regulation of interstate tender offers]; *Castle v. Hayes Freight Lines*, 348 U.S. 61 (1954) [state could not bar interstate carrier from state highways where to do so would conflict with federal Act].

The facts of the present case are distinctly different. Allied does not claim that Connecticut's statute discriminates against interstate commerce, is unduly burdensome, or that the state lacks a legitimate interest in protecting its consumer debtors. Further, unlike the cases it cites, Allied is not involved in a tender offer or the interstate sale or shipment of goods which involve quite different national interests than the regulation of consumer debt collection practices.

In addition, the Circuit Court identified a number of factors which distinguish Connecticut's license provision from the requirements challenged in *Allenberg* and other

cases on which Allied relies. First, Connecticut's license requirement for collection agencies is "an integral part of a precise regulatory scheme," which provides "an easy means of enforcing the substantive regulation of debt collection." (P.App., 8A). While Allied argues, on the basis of *Castle v. Hayes Freight Lines*, 348 U.S. 61 (1954), that this is not a valid reason for sustaining the license statute where other remedies provided by the regulatory scheme (cease and desist order and injunction) are sufficient to allow the state to protect its consumer debtors, realistically, the out-of-state agency has little to fear from such actions. Only licensing ensures effective enforcement by prohibiting creditors, who usually have substantial contact with the state, from using unlicensed collection agencies. We also note that in addition to preventing abusive collection practices, licensing is designed to ensure that sums paid by debtors are properly accounted for (see §42-127a(b), C.G.S.; P.App., 39A). Licensing is thus central to the regulatory scheme aimed at protecting Connecticut's consumer debtors.

Next, the Circuit Court identified Allied's uniquely local contacts. The Court stated that "collection practices have long been viewed as a proper matter for regulation by the states," (P.App., 8A), in that while the means of communication used by the debt collector may be interstate, "the perceived abuses and consequent harm . . . are almost entirely localized." (P.App., 9A). In this regard the Court also noted that agencies like Allied are not trying to enforce their own contracts as in *Allenberg*, but generally they are trying to collect debts which were incurred locally and owed to companies which have significant contacts with the state. While Allied's debt collection business may indeed affect commerce, the nature of its business and its contacts with Connecticut distinguished it from the purely interstate trader it claims to be.

2. No Conflict with *New England Power Co. v. New Hampshire*

The Circuit Court also found that *Allenberg* was distinguishable on a second distinct ground; that is, the licensing scheme is within the permitted scope of 15 U.S.C. §1692n, which allows the states to afford greater protection to debtors than the federal Fair Debt Collection Practices Act, 15 U.S.C. §1692, *et seq.* In this respect the Circuit Court gave greater emphasis to §1692n than the District Court but held that it was not a *carte blanche* grant to the states to pass laws which would make the business of multi-state debt collection agencies impossible. Allied claims that this ruling is in conflict with this Court's decision in *New England Power Co. v. New Hampshire, supra.*

In *New England Power* the Court held that a New Hampshire statute which allowed the state to prohibit the transmission of hydroelectric power out of the state if it was needed in New Hampshire was protectionist legislation which violated the Commerce Clause. In addition, the Court held that the "savings clause" of the Federal Power Act (cited 102 S.Ct. at 1101) which merely provided that the states retained such "lawful authority" as they had exercised over the exportation of hydroelectric energy was in no sense an affirmative grant of authority to burden interstate commerce.

The present case is again distinguishable for two reasons. First, there is no claim that the regulatory scheme here is protectionist or burdensome. Second, 15 U.S.C. §1692n authorizes the states to pass *stricter* laws for the protection of consumer debtors making it distinctly different than the savings clause at issue in *New England Power.* In any case, Allied's argument avoids the major issue; for however one views §1692n, it is, at the least, a clear Congressional statement of

the need for state regulation which makes this case very different from the situation presented in *Allenberg*, or any of the other cases cited by Allied.

B. THERE HAS BEEN NO DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS

Allied claims it was error for the Circuit Court to fail to remand this case to the District Court for a fuller showing of the burdens imposed by possible multi-state regulation. As we pointed out in the courts below, however, this issue is completely hypothetical. Indeed, Allied states in its brief to this Court that it ". . . has never been required to obtain a license in order to conduct its business with respect to debtors located in any other state, and has no such licenses." (P.Brief, 5). This Court has stated that it will not decide hypothetical questions in advance of the necessity for decision. *Thorp v. Housing Authority of the City of Durham*, 393 U.S. 268, 284 (1968).

C. THERE IS NO IMPORTANT ISSUE REQUIRING SETTLEMENT BY THIS COURT

This case was decided on the basis of its facts applying this Court's test set out in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). The conclusion was that the state regulatory scheme for consumer debt collectors did not discriminate against out-of-state agencies, produced only minimal burdens on interstate commerce, and was supported by an overwhelming state interest in protecting its consumer debtors. At a minimum the legitimacy of this state interest was recognized by Congress. There has been no harm to Allied and no national interest has been offended by the challenged Connecticut statute. Accordingly, there is no necessity for action by this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of March, 1983, I served a copy of the foregoing brief by mailing, postage prepaid, to the following:

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